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No. _____

In The
Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, ET AL.,
Petitioners,

v.

JAMES W. GREEN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit held that the inclusion of a Ten Commandments monument amidst other privately donated historical monuments on a county courthouse lawn violated the Establishment Clause of the First Amendment, despite this Court's decision in *Van Orden v. Perry*, 545 U.S. 677 (2005). The Tenth Circuit then denied rehearing *en banc* on an equally divided, 6-6 vote. The questions presented are:

1. Did the Tenth Circuit err by holding in conflict with *Van Orden* and recent decisions in the Ninth and Eighth Circuits, that it violated the Establishment Clause to include a monument passively acknowledging the historical significance of the Ten Commandments among other privately donated historical monuments?

2. Did the Tenth Circuit err by invoking an *uninformed and mistaken* "reasonable observer" in applying the endorsement test, in conflict with the *well-informed* "reasonable observer" employed by the Second, Sixth, Seventh, and Eighth Circuits in Establishment Clause cases?

3. Did the plaintiff, as an un-coerced "offended observer," lack Article III standing?

PARTIES

Petitioners Haskell County Board of Commissioners (also known as Board of County Commissioners of Haskell County, Oklahoma) and Kenny Short, in his official capacity as chairman of the Haskell County Board of Commissioners, were the Defendants-Appellees before the Tenth Circuit.

Respondent James W. Green was a Plaintiff-Appellant before the Tenth Circuit. The American Civil Liberties Union of Oklahoma was a Plaintiff in the United States District Court for the Eastern District of Oklahoma. The District Court held that the ACLU lacked standing. Appendix 85a ("App."). The Tenth Circuit held that the ACLU's argument to the contrary was "inadequately raised," and did not address it. App. 15a n.5.

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DECISIONS BELOW

The district court, after a bench trial, ruled in favor of defendants and refused to grant plaintiffs any relief. Its decision is reported as *Green v. Bd. of County Comm'rs of Haskell,* 450 F. Supp. 2d 1273 (E.D. Okla. 2006). App. 56a. The decision of the court of appeals reversing the district court's order is reported as *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784 (10th Cir. 2009). App. 1a. The decision of the court of appeals denying rehearing *en banc* in a 6-6 split with two dissenting opinions is reported at *Green v. Haskell County Bd. of Comm'rs*, 574 F.3d 1235 (10th Cir. 2009). App. 112a.

JURISDICTION

The Tenth Circuit rendered its panel decision on June 8, 2009. Petitioners filed a petition for rehearing *en banc* on June 19, 2009. The United States Court of Appeals denied the petition for rehearing *en banc* on a vote of six to six on July 30, 2009. Judge Kelly filed a dissenting opinion in which Judges Tacha and Tymkovich joined. Judge Gorsuch also filed a dissenting opinion that was joined by Judges Tacha, Kelly, and Tymkovich. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICIES

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

> exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions

For many years Haskell County, Oklahoma has displayed donated permanent monuments on the County courthouse lawn in Stigler, Oklahoma. App. 58a-59a. The courthouse and lawn are in the middle of one square block. App. 57a. There are currently at least ten displays on the courthouse lawn, including the one at issue in this case.

The War Memorial for World Wars I and II is the largest and first monument to be placed on the lawn. App. 58a. It was erected over 20 years ago, is approximately 12 feet by 12 feet, and, *inter alia,* contains the names of those killed in those wars from Haskell County. App. 58a.

Two smaller monuments for the Vietnam and Korean Wars are in front of the World Wars Memorial. App. 58a. A large marble monument honoring the Choctaw Nation also stands on the front lawn. App. 58a. This monument was erected in 1984.

The courthouse lawn includes a memorial honoring those buried in unmarked graves in Haskell County. App. 58a-59a. This monument was erected by the local historical society in 2004. Two marble benches dedicated to, and installed respectively, by the Class of 1954 and Class of 1955 are also on the lawn. The names of members of the graduating class are inscribed on the tops of the benches. App. 59a. One of the sidewalks contains a section of more than 140 personal message bricks. Each brick expresses a dedication to a loved one or sponsor such as "Earl & Effie Cantrell" or "Oklahoma Natural Gas Company." App. 59a. The courthouse lawn also contains a flagpole and displayed American flag. App. 60a.

Private citizens paid for and erected most of the monuments. App. 58a. All of these monuments are on the same lawn and can be viewed at one time. App. 11a, 52a

Mike Bush, a citizen of Haskell County, had the idea to erect a monument of the Ten Commandments and the Mayflower Compact ("Monument") on the

Courthouse lawn. App. 61a. On September 27, 2004, he approached the County at a regularly scheduled meeting and requested permission to erect a monument containing the Ten Commandments. App. 61a-62a. The District Court found that the County was aware that it had set a precedent of permitting citizens to erect monuments. App. 79a. The Commissioners "discussed the historical aspects of the project," App. 62a, and "view[ed] the Commandments and the Compact as historically significant." App. 74a. It then approved the Monument, which contains the text of The Ten Commandments on the front, along with a statement that it was "Erected by Citizens of Haskell County." App. 63a-64a. The text of the Mayflower Compact is on the back. App. 66a-67a.

Mike Bush designed the Monument and raised money from the community to pay for all expenses related to its display. App. 62a. "The Board never approved, or even reviewed, Bush's design of the Monument or the version of the Commandments that appears on it." App. 68a. And the County did not officially review or approve the addition of the Mayflower Compact, or the language "Erected by the Citizens of Haskell County" to the Monument. App. 68a.

The Monument is not the most prominently placed display. App. 103a-104a. Most people park in the side or rear lots and can only see the back of the Monument (which contains the Mayflower Compact) from a distance as they move from their cars to enter the courthouse. App. 57a, 52a, 63a, 103a. The Monument stands immediately beside, and is less than five feet from, the Unmarked Graves Monument. App. 11a; 521. It is approximately 50 feet from the war

monuments, and 25 ft. from the edge of Highway 9. *Id.*

Mike Bush organized and presided over a dedication ceremony of the Monument on Saturday, November 7, 2004. The ceremony was not sponsored by the Commissioners nor by the County. App. 62a. Two Commissioners, Sam Cole and Henry Few, attended this ceremony, but did not speak, and the District Court found that "[a]pparently, neither gentleman appeared in his official capacity as County Commissioner." App. 62a. Neither of these men is currently a commissioner. App. 61a.

After this lawsuit was filed, Mike Bush organized and presided over a rally on the courthouse lawn on Saturday, November 19, 2005, to encourage the County to stand by its decision to allow the Monument to be displayed. App. 70a-71a. Mr. Cole and Mr. Few attended the rally, but the District Court found "there is no indication they attended in their official capacity as County Commissioners." App. 71a, 100a. Mr. Few spoke briefly at the rally, but he did not say anything religious. App. 71a, 94a. Mr. Cole did not address the crowd. *Id.*

The gatherings for the dedication and rally regarding the Monument were not unusual. "[A] number of public and private events take place on the courthouse lawn and at the gazebo" in front of the courthouse, including those that observe Veterans Day, a Silent March for Victims of Domestic Violence, and Reunion Days. App. 58a, 104a.

After this lawsuit was filed, the County passed a resolution entitled, "A Policy Governing Placement Of

Plaques, Structures, Displays, Permanent Signs and Monuments On Public Property In Haskell County, Oklahoma." This Policy codifies the policy and practice that Haskell County has followed for many years permitting Haskell County citizens to donate monuments for display on the courthouse lawn upon obtaining permission from the Commissioners. App. 60a n.3.

Green objected to the Monument due in part to statements made by the Commissioners after the monument was erected, not the Monument itself.[1] None of the comments Green contends indicate an impermissible purpose on the part of the Commissioners were made during a Commissioners' meeting or any other setting where they were performing an official function of their office. All were made to newspaper reporters, were made in the Commissioners' individual capacities, and reflected their personal beliefs. App. 12a-13a, 71a.

B. Course of Proceedings

Plaintiffs James Green and the ACLU of Oklahoma filed this action against the Haskell County Board of

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[1] Green also testified that he has a theological objection to the text of the Ten Commandments on the Monument because of their "terroristic origins," referring to Exodus 20:4 which talks about the sins of the fathers being visited upon the sons. App. 69a. But that Bible passage is not contained on the monument, App. 69a n.10, and the district court found "he was inconsistent in his testimony regarding whether he was more offended by the Monument itself or by the Commissioners' alleged statements about the Monument." App. 75a. He conceded that the Ten Commandments have historical significance. *Id.*

Commissioners and its chairman, Sam Cole, in his official capacity, in the United States District Court for the Eastern District of Oklahoma on October 6, 2005. The complaint alleged that Defendants violated the First and Fourteenth Amendments to the United States Constitution when they accepted the donation of a Ten Commandments monument for display on the courthouse lawn along with other donated monuments. Plaintiffs sought declaratory judgment, prospective injunctive relief, attorneys' fees, and costs. After Sam Cole passed away on March 18, 2006, the parties substituted Commissioner Henry Few for Cole as a named Defendant. When Mr. Few was not reelected in 2007, Kenny Short was substituted for him as defendant on March 13, 2007. On April 11, 2006, the district court denied the parties' cross-motions for summary judgment.

The court held a two-day bench trial on May 1 and 2, 2006, and issued an opinion granting final judgment to Defendants on August 18, 2006. It determined that the facts of the case are more closely analogous to *Van Orden v. Perry*, 545 U.S. 677 (2005), rather than *McCreary County v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), based primarily on the location of the Monument outside the courthouse among other historical monuments, and the fact that a private individual initiated, paid for, and installed the monument. The district court also felt constrained by Tenth Circuit precedent to apply the *Lemon* test and found that the County had a secular purpose of acknowledging the historical significance of the Ten Commandments. And the court determined that a reasonable observer would not perceive endorsement of religion because the courthouse lawn is a "community gathering place" that hosts "an array of

monuments with diverse messages ...[that] clearly represent what Haskell County citizens consider the noteworthy events and sentiments of their county, their state and their nation." App. 104a.

Plaintiffs filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit on September 14, 2006. The Court of Appeals entered its opinion reversing the district court on June 8, 2009. Despite numerous factual similarities, the Court of Appeals distinguished *Van Orden*, purported to apply the *Lemon* test as set forth in *McCreary*, 545 U.S. 844 (2005), and held that the Monument impermissibly endorses religion.[2] In doing so, the court considered irrelevant facts such as the age of the monument, how quickly it was challenged, whether it was displayed by a small or large town, and the personal religious views of the government officials who allowed it. Defendants filed a petition for rehearing *en banc* on June 19, 2009, which was denied in a 6-6 vote on July 30, 2009. Judge Kelly filed a dissenting opinion in which Judges Tacha and Tymkovich joined. He urged rehearing *en banc* based on three problems with the panel opinion: (1) it established a rule that new Ten Commandments monuments are always unconstitutional as long as someone sues quickly enough; (2) it assumed smaller towns are more likely to violate the Establishment

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[2] The Tenth Circuit invoked the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as "refined" by Justice O'Connor's Endorsement Test. App. 22a-23a. It defined that test as: "the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *Id.* at 23a. And it used a distorted version of the "reasonable observer" to determine if endorsement occurred. *Id.* at 28a.

Clause; and (3) it utilized a reasonable observer that is not objective. Judge Gorsuch also filed a dissent, joined by Judges Tacha, Kelly, and Tymkovich. His opinion pointed out the need to avoid a split in the circuits in applying *Van Orden*, and observed that cases like *Van Orden* – such as this one – should come out like *Van Orden*.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's split with the Ninth and Eighth Circuits on whether similar Ten Commandments monuments are constitutional reveals the confusion arising after this Court's decisions in *Van Orden* and *McCreary*. Circuit courts need this Court's guidance on the proper analysis to apply to monuments passively acknowledging religion's historical significance that are part of historical displays on government grounds. Otherwise, these cases will continue to be decided based on irrelevant facts like those that led to the finding of unconstitutionality in this case.

This case provides the Court with an opportunity to correct the doctrinal instability currently existing in religious display cases because of uncertainty about whether to apply the *Lemon* test (as in *McCreary*), or the historical analysis, as in *Van Orden*. As Judge Gorsuch noted in his dissent below, "at least until our superiors speak, we leave the state of law 'in Establishment Clause purgatory.'" App. 134a-135a (quoting *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005)).

Van Orden's historical analysis should govern here in view of the similarities between the cases. But to

the extent the *Lemon* and endorsement tests have any relevance to passive historical displays that include the Ten Commandments, the Tenth Circuit's opinion shows there is a need to spell out the proper standards for determining whether there is impermissible endorsement. The misinformed and mistaken reasonable observer used by the Tenth Circuit in this case stands in stark contrast to the well-informed reasonable observers employed by the Second, Sixth, Seventh, and Eighth Circuits.

This Court should grant review to resolve these multiple conflicts among the circuits.

This case also presents the issue of whether the doctrine of offended observer standing – unique to Establishment Clause cases – should continue unchecked so as to allow anyone who claims to be annoyed by a religious display to challenge it. This virtually boundless standing rule has contributed to the confusion in Establishment Clause jurisprudence by allowing cases to proliferate without the traditional safeguards to ensure there is a concrete dispute before the court.

I. THE TENTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS COURT, AND OF THE NINTH AND EIGHTH CIRCUITS – ALL OF WHICH HELD THAT PASSIVE DISPLAYS OF THE TEN COMMANDMENTS, ALONG WITH OTHER HISTORICAL MONUMENTS ON GOVERNMENT PROPERTY, DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The conflict between this case and decisions of this Court as well as the Ninth and Eighth Circuits is a product of the lower courts deriving inconsistent legal standards from *Van Orden* and *McCreary*. Even a cursory review of the relevant facts surrounding Haskell County's Ten Commandments monument indicates it is almost exactly like the display in *Van Orden*. Both the Ninth and Eighth Circuits, facing similar displays, followed *Van Orden*, did not apply the *Lemon* test, and found Ten Commandments monuments like the one at issue here constitutional. But the Tenth Circuit in this case limited *Van Orden* to cases involving *old* monuments, and – in direct conflict with the Ninth and Eighth Circuits – monuments that are part of displays that have a "unifying" theme. It then became the first circuit court since *Van Orden* to apply *McCreary* and strike down a Ten Commandments monument displayed on government grounds with other historical monoliths.

A. Conflict with *Van Orden* and Inapplicability of *McCreary*.

The plurality opinion in *Van Orden* held that in cases where the government passively acknowledges the historical significance of the Ten Commandments by displaying them on a monument erected near other historical monuments, the test from *Lemon v. Kurtzman*, is not helpful.

> Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our

> analysis is driven both by the nature of the monument and by our Nation's history.

545 U.S. at 686. Chief Justice Rehnquist emphasized the historical significance of the Ten Commandments rather than the notoriously difficult to apply *Lemon* test. *Id.* at 688-90. He concluded that the Ten Commandments display did not violate the Establishment Clause without even considering whether the government officials had an improper motive or purpose or there was perceived endorsement of religion. *Id.* at 691-92.

Justice Breyer, whose concurrence supplied the fifth vote for determining there was no Establishment Clause violation in *Van Orden*, also refused to strictly apply the *Lemon* test. "I rely less upon a literal application of any particular test than upon consideration of the basic purposes of the First Amendment's Religion Clauses themselves." 545 U.S. at 703-04 (Breyer, J., concurring). Justice Breyer emphasized the historical significance of the monument rather than religious purpose or endorsement. He noted that the Ten Commandments

> convey a historical message (about a historic relation between those standards and the law) . . . . [and] [t]he setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics

> and law that the State's citizens, historically speaking, have endorsed.

Id. at 701-02 (Breyer, J., concurring).

1. *Van Orden*'s facts are virtually identical to those in this case.

Judge Kelly observed in his dissent from denial of rehearing *en banc* below that "[t]he disposition in this case cannot be reconciled with *Van Orden*, which ought to control given the substantial similarities between the operative facts in the two cases." App. 116a. These substantial similarities include:

1. Display of a Ten Commandments monument was initiated by a private entity. 545 U.S. at 701 (Breyer, J., concurring), App. 61a.

2. The monument was paid for with private funds. 545 U.S. at 682, App. 61a-62a.

3. The private donor determined the content of the monument. 545 U.S. at 701, App. 67a-68a.

4. The monument was displayed along with other historical monuments outside a government building on government property. 545 U.S. at 702, App. 58a-59a.

5. The monument includes a statement indicating it was donated by private citizens. 545 U.S. at 701-02, App. 64a.

6. The display area does not lend itself to meditation. 545 U.S. at 702, App. 57a-59a.

7. The monument donors allegedly had a religious purpose. 545 U.S. at 707 (Stevens, J., dissenting), *id.* at 738 (Souter J. dissenting), *id.* at 701 (Breyer, J., concurring), App. 61a.

8. Government officials selected the site for the monument. 545 U.S. at 682, App. 11a.

9. The dedication ceremony for the monument was attended by two government officials. 545 U.S. at 682, App. 62a.

The only significant differences between *Van Orden* and this case actually weigh in favor of finding no Establishment Clause violation. The monument in *Van Orden* contained the Star of David and symbols representing Christ, and the text emphasized "I am the Lord thy God." 545 U.S. at 739 (Souter, J., dissenting). Here, there are no religious symbols, and the only thing on the monument besides the Ten Commandments – other than noting who donated it – is the text of the Mayflower Compact. Moreover, unlike *Van Orden*, none of the commandments is emphasized more than any other. App. 62a-63a, 56. In *Van Orden*, a legislative resolution was passed commending the Fraternal Order of Eagles – the donor of the monument (and a group that required members to believe in a Supreme Being). 545 U.S. at 739 n.3 (Souter, J., dissenting). No such resolution was passed supporting the donor in this case. Finally, the dedication of the monument in *Van Orden* was actually "presided over" by two legislators, 545 U.S. at 682, but in this case, the private donor, Mike Bush, presided over the dedication, and neither of the commissioners who attended the ceremony spoke. App. 62a, 93a.

The Tenth Circuit distinguished *Van Orden* by claiming the monuments in front of the Haskell County courthouse do not have a "unifying, cohesive, secular theme." App. 42a, n.16. But the collection of displays here is remarkably similar to that on the Texas State Capitol grounds in *Van Orden*. The thirteen monuments there are referred to as: Heroes of the Alamo, Volunteer Fireman, Texas Cowboy, Spanish-American War, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. 545 U.S. at 681 n.1.

Haskell County's display includes monuments to veterans of World Wars I and II and the Korean and Vietnam Wars, Pioneers, the graduating classes of 1954 and 1955, Native Americans, and over 140 paving brick memorials to other people who lived and died in the State of Oklahoma. App. 58a-59a. It also contains a flagpole and displayed flag. App. 58a. If the Ten Commandments display along with the historical monuments in *Van Orden* provided a coherent display that "communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed," 545 U.S. at 702, so does the display in the case at bar. Moreover, as Judge Gorsuch observed below, "[t]he display *does* have a unifying theme: it memorializes and celebrates people and ideals important to Haskell County." App. 139a. He goes on to demonstrate that this is just as much a unifying theme as exists in "Congress's collection of monuments in Statuary, which includes likenesses of

George Washington (Virginia), Brigham Young (Utah), and Father Junipero Serra (California)." *Id.*

There is a difference between the setting in *Van Orden* and the one in Haskell County, but it favors upholding the monument. The monuments in Texas are spread over 22 acres, while the area the monuments in Haskell County occupy is small and all monuments are within sight of each other. App. 11a, 52a, 57a. Justice Souter thought the Texas monuments were spread so far apart, each would be taken "on its own terms," instead of part of one display. 545 U.S. at 742-43 (Souter, J. dissenting). There is no such concern in this case.

The Tenth Circuit also distinguishes *Van Orden* based on Justice Breyer's observation that the Ten Commandments monument in that case had been in place for 40 years before any complaints were made. App. 43a; *Van Orden*, 545 U.S. at 679 (Breyer, J., concurring). But there is no indication that a majority of this Court would ever consider this a determinative factor. As Justice Souter noted in *Van Orden*, "I doubt that a slow walk to the courthouse, even one that took 40 years, is much evidentiary help in applying the Establishment Clause." 545 U.S. at 747 (Souter, J., dissenting). This Court has invalidated older practices as violating the Establishment Clause. *See, e.g., School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 270 (1963) (50 year old practice of reading the Bible in Pennsylvania public schools violated Establishment Clause). And it has upheld newer ones. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (voucher program established in 2000 did not violate Establishment Clause). The Tenth Circuit's decision to make this the "determinative" factor

conflicts with the Sixth Circuit's opinion in *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624, 626-27 (6th Cir. 2005), which upheld a Ten Commandments display that was challenged in court the very next month after it was erected. *See* section II(B), *infra*. *Mercer* was decided after *Van Orden* was handed down.

And as Judge Kelly observed, considering the amount of time a Ten Commandments display goes unchallenged "comes perilously close to creating a new bright-line rule: all new Ten Commandments displays are unconstitutional as long as someone is willing to exercise a heckler's veto by filing suit – and, assuredly, there will be someone. . . . [W]hereas old ones will (generally) be deemed constitutional. Such a result is absolutely arbitrary and cannot be the result mandated by the Establishment Clause." App. at 122a (Kelly, J., dissenting).

The absurdity of using the age of the monument as a decisive factor in determining its constitutionality is illustrated well by recent cases from the Ninth and Eighth Circuits (*See* Sections I(B) & (C), *infra*) upholding monuments very similar to the one found unconstitutional here. The only significant difference between those cases and this one is the date the monument was erected.

2. *McCreary* does not apply to passive acknowledgements of religion.

Despite the substantial similarities between this case and *Van Orden*, the Tenth Circuit decided to follow *McCreary* and apply *Lemon*. This mistake of law is grave, but perhaps understandable. Judge

Gorsuch laments that "*McCreary* and *Van Orden's* mixed messages have left the circuits divided over whether *Lemon* continues to control the Establishment Clause analysis of public displays. . . . [And] intermediate appellate judges seeking to identify the rule of law that governs Establishment Clause challenges to public monuments surely have their hands full. . . ." App. at 134a (Gorsuch, J., dissenting).

The need for direction from this Court is evidenced within the Tenth Circuit itself, where the 12 judges were evenly split on whether the Panel reached the proper result. The dissatisfaction with the Panel Opinion by half of the Tenth Circuit judges is not surprising given the substantial *differences* between the facts of this case and *McCreary*. Unlike the monuments in *Van Orden* and the case at bar, *McCreary* considered a Ten Commandments display that was initiated and paid for by the government itself. *McCreary*, 545 U.S. at 851. "When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable." *Id.* at 869. The Haskell County Monument was initiated, donated, and erected by a private speaker and, from the outset, displayed amongst other monuments that had various secular messages. Conversely, in *McCreary*, the religious plaque was conceived of and paid for by the government, and was initially displayed alone, and then later as part of a display of excerpts from other historical documents that were selected precisely because of their religious message. *Id.* at 851-54. Moreover, the display in McCreary was purposely placed in a high traffic area inside the courthouse, and authorized by a resolution laced with religious themes. *Id.* None of these facts exist in this case.

Despite these differences, the Tenth Circuit felt obliged to follow its previous decision in *O'Connor v. Washburn University*, 416 F.3d 1216, 1224 (10th Cir. 2005), which determined that it must apply *McCreary*'s *Lemon* analysis to religious display cases until this Court overrules *Lemon*. This position ignores *Van Orden* and stands directly in conflict with decisions of the Ninth and Eighth Circuits.[3]

B. Conflict with the Ninth Circuit's Decision in *Card v. City of Everett*

In *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008), the Ninth Circuit held "we do not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context." The court declined to apply *Lemon* while recognizing that it is doubtful any Ten Commandments display could survive scrutiny under that test. *Id.* at 1015-16.

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[3] The Fourth Circuit took a similar position to the Eighth and Ninth Circuits in *Myers v. Loudon County Public Schools*, 418 F.3d 395, 402 (4th Cir. 2005), where it did not apply *Lemon* in a case challenging voluntary recitation of the pledge in public schools. *See* App. 134a (Gorsuch, J., dissenting). And after *Van Orden*, the Fifth Circuit applied the *Lemon* test to the display of a Bible as part of a historical monument on a courthouse lawn along with four other historical monuments in *Staley v. Harris County, Tex.*, 461 F.3d 504 (5th Cir. 2006). But that opinion was vacated by the Fifth Circuit *en banc* because the case was mooted by the county's voluntary (but temporary) removal of the monument while the case was pending. 485 F.3d 305, 313 n.5 (5th Cir. 2007).

It went on to uphold a Ten Commandments monument that was donated by a private party – the Fraternal Order of Eagles – which the court found had "a strong interest in the religious aspects of the Ten Commandments." *Id.* at 1019. In addition to the Decalogue, the monument included a Star of David and symbols representing Christ. *Id.* at 1011.

The monument was displayed in front of the Old City Hall building which housed the Police Department. *Id.* The only other monument in front of Old City Hall was a war memorial, but the court considered in its analysis four other monuments across the street – a September 11 memorial (obviously much newer than the Ten Commandments monument), a Medal of Honor memorial, a county war memorial, an Armed Forces monument, and a monument to the common worker. *Id.* at 1010-11. The court did not inquire as to whether the six monuments had a "unifying theme," but emphasized that the setting did not lend itself to the sacred. *Id.* at 1019-21.

The Ten Commandments monument was dedicated at a ceremony where clergy spoke. *Id.* at 1012. And the mayor of the city attended the dedication ceremony in his official capacity to accept the monument. *Id.* The Ninth Circuit determined that *Van Orden* controls on these facts. *Id.* at 1016.

Other than the age of the monument – it was erected in 1959[4] – the only differences between it and

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[4] Unlike *Van Orden*, the City of Everett did receive complaints about the monument years before it was actually challenged in court. *Id.* at 1012.

Haskell County's make the County's monument more obviously constitutional. The County's Monument here is displayed with at least nine other monuments (as compared to five in Everett) and all of the monuments are on the same side of the street, allowing them to be viewed at the same time. The Ten Commandments monument here contains no symbolic references to Christianity or Judaism and no government official took part in the dedication ceremony or even attended in an official capacity.

The only real difference between the monument in the City of Everett and the one in Haskell County is age. As Judge Kelly points out in his dissent, this demonstrates the holding in this case is "absolutely arbitrary and cannot be the result mandated by the Establishment Clause." App. 122a (Kelly, J., dissenting).

C. Conflict with the Eighth Circuit's Decision in *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*

The Eighth Circuit's recent decision in *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 419 F.3d 772, 773 (8th Cir. 2005) (*en banc*), addressed a monument donated by the Fraternal Order of Eagles in 1965 (6 years after the City of Everett monument was erected). The monument included a Star of David and symbols of Christ. *Id.* at 773. And it was the *only* monument displayed in a 45-acre public park – so there was not even a hint of a "unifying theme." *Id.* at. 777 n.7. The Eighth Circuit found that *Van Orden* controlled and *Lemon* was inapplicable. *Id.* at 777, 778 n.8 (though it would uphold under *Lemon* if it were to apply it).

Like the monument in the Ninth Circuit case, the only differences between Plattsmouth's monument and Haskell County's – other than age – make the Haskell County monument more obviously constitutional. Haskell County's monument does not include any references to Christianity or Judaism and is displayed along with at least nine other historical monuments in about an acre of land where all the monuments can be viewed together.[5] The different results in *Plattsmouth* and *Green* can only be explained by the age of the monument – an arbitrary and unreasonable factor upon which to base an important constitutional decision.

The facts of this case provide this Court with an opportunity to resolve these conflicts, eliminate the confusion created by *Van Orden* and *McCreary*, and confirm that the arbitrary factor of monument age and subjective determination of a unifying theme should not be used to determine constitutionality.

II. THE DECISION BELOW MISAPPLIED THE ENDORSEMENT TEST AND CREATED A SPLIT BETWEEN THE TENTH CIRCUIT, AND THE SECOND, SIXTH, SEVENTH, AND EIGHTH CIRCUITS.

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[5] One other difference is the monument in *Plattsmouth* was displayed in a public park, while the one in this case is on a lawn in front of the county courthouse. But this is not a significant distinction here because the lawn is used as a public park by the citizens of Haskell County. The district court determined that "a number of public and private events take place on the courthouse lawn and at the gazebo" in front of the courthouse, which is a "community gathering place." App. 58a, 104a.

Even if *Lemon* did provide the proper test for this case, the Tenth Circuit's application of it conflicts with holdings in the Second, Sixth, Seventh, and Eighth Circuits. Judge Gorsuch observed in his dissent that, in utilizing the endorsement test's reasonable observer (an initial mistake), the Panel erred further in assuming the observer would make the mistake of considering evidence that has no bearing on whether an impermissible endorsement has occurred, and "[t]he result is not simply a misapplication of the reasonable observer test: it is a rewriting of that test in a manner inconsistent with our sister circuits' application of it." App. 141a.

A. Conflict with the Second Circuit

For example, the Second Circuit in *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), found that a holiday display that included a crèche was not an impermissible endorsement because the reasonable observer was deemed to be aware of all the other parts of the display. The court held that a "reasonable observer doesn't wear blinders," but knew that the city displayed other, non-religious items around town – even though they were not even in the same park as the crèche. *Id.* at 53-55. This is at odds with the Tenth Circuit's "reasonable" observer, who focuses exclusively on the Ten Commandments display and doesn't consider the other nine monuments on the courthouse lawn, all of which are only feet away. App. 11a, 52a.

B. Conflict with the Sixth Circuit

The Sixth Circuit in *ACLU of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624 (6th Cir. 2005), upheld

a Ten Commandments display inside a courthouse, and observed that "[f]ortunately, the reasonable person is not a hyper-sensitive plaintiff. Instead, he appreciates the role religion has played in our governmental institutions, and finds it historically appropriate and traditionally acceptable for a state to include religious influences, even in the form of sacred texts, in honoring American legal traditions." *Id.* at 639-40 (citation omitted). This is contrary to the Tenth Circuit's "reasonable" observer in this case, which "is an admittedly *un*reasonable one. He just gets things wrong." App. 136a (Gorsuch, J., dissenting).

C. Conflict with the Seventh Circuit

The Seventh Circuit in *Books v. Elkhart County, Indiana*, 401 F.3d 857, 869 (7th Cir. 2005), upheld the Ten Commandments displayed along with other historical documents inside the county's main administrative building. The court found there was no endorsement of religion, emphasizing that "[t]he effect of a display of a religious object on public property is evaluated against an objective, reasonable person standard, not from the standpoint of the hypersensitive or easily offended. . . . [W]e ask whether an objective, reasonable observer, aware of the history and context of the community and forum in which the religious display appears, would fairly understand the display to be a government endorsement of religion." *Id.* at 867 (citation and quotation marks omitted). *Books* stands in conflict with the "reasonable" observer in the case at bar, who is "unreasonable," bases his conclusions on speculation instead of facts, "forgets" important facts, makes factual errors, leaps to

conclusions, and performs badly as an art critic.[6] App. 136a-141a (Gorsuch, J, dissenting).

D. Conflict with the Eighth Circuit

Lastly, the holding in this case directly conflicts with the Eighth Circuit's application of the endorsement test to similar facts in *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989). School board members in *Clayton* made numerous statements regarding their personal religious convictions on allowing dancing at the school. *Clayton v. Place*, 889 F.2d 192, 193-94 (8th Cir. 1989) (Gibson, J., dissenting from denial of rehearing *en banc*). These statements were made in conjunction with a board meeting where a vote was taken on whether to keep a ban on dancing in place. But the Eighth Circuit found that there was no endorsement in violation of the second prong of the *Lemon* test, explaining its rationale as follows.

> We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action. Cf. *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("It is unrealistic * * * to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a

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[6] Presaging Judge Gorsuch's comment, Judge Easterbrook observed that the endorsement test requires "scrutiny more commonly associated with interior decorators than with the judiciary." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

> participant in the decisional process."). To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral. . . . We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards.

Clayton, 884 F.2d at 380.[7]

Unlike the board members in *Clayton*, none of the statements made by the Commissioners in this case regarding the Ten Commandments indicate that they voted to allow the display because of their religious beliefs, and no religious statements were made by the Commissioners at Commissioners' meetings or in their official capacities. App. 7a, 93a-94a, 99a-101a. The Tenth Circuit asserts that the personal religious views of the Commissioners are relevant here because Haskell County is rural and Stigler, Oklahoma is a small town. App. 35a. But *Clayton* arose out of Purdy, Missouri, "a small, primarily rural community in southwestern Missouri." 884 F.2d at 378. The Tenth Circuit fails to cite a single case holding that Establishment Clause concerns are heightened in

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[7] *See also Alvarado v. City of San Jose*, 94 F.3d 1223, 1231 (9th Cir. 1996) (where statements at an unveiling ceremony made by city council members indicating their spiritual response to a statue of an ancient Aztec god displayed in a city park did not render the statue "religious" for purposes of the Establishment Clause).

small towns. This sets a hazardous precedent that imperils the acts of small town officials.

Moreover, only information in the "text, legislative history, and implementation of the statute, or comparable official act" can be used to determine legislative purpose. *McCreary*, 545 U.S. at 862 (quotation marks omitted). None of the statements made by the Commissioners in this case was made at a board meeting or in any official capacity. Judge Gorsuch points out that "a single county commissioner ...made religious remarks, all phrased in the first person. As the panel opinion acknowledges, these statements were made in the commissioner's private capacity, and he was under no obligation to censor his personal views. Panel Op. at 34 [App. 34a]. Nevertheless, our observer *erroneously* attributes these remarks to the county government. *Id.* at 34-35, [App. 34a-35a]." App. 137a.

Contrary to the reasonable observer utilized by the Second, Sixth, Seventh, and Eighth Circuits, the observer in the Tenth Circuit is decidedly uninformed and anything but objective.[8] This observer concludes the Ten Commandments monument endorses religion by looking at "the private donor's intent, the statement of a single commissioner in his concededly private capacity, the county's refusal to buckle to litigation pressure, and the county's perceived lack of artistic taste. None of this, of course, is evidence that the

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[8] The published opinions in these cases from other circuits indicate that the government defendants there vigorously defended their displays from Establishment Clause challenges. But the Tenth Circuit here actually considers such defense as evidence of endorsement of religion. App. 37a.

Constitution was violated. But to our observer, apparently it can be *mistaken* for such evidence." App. 140a (Gorsuch's, J., dissenting). *Certiorari* should be granted to resolve this split on how *Lemon* and the endorsement test are applied.

E. Conflict on the Standard of Review

This case also provides the Court with the opportunity to clarify the standard of review to be applied to Establishment Clause cases where the district court has conducted a trial. There is currently a three way split among the circuits regarding whether the standard is *de novo* or clear error.

This Court applied the clearly erroneous standard to the Establishment Clause claim in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Five justices signed on to this opinion, including Justice O'Connor, who wrote separately only "to suggest a clarification of our Establishment Clause doctrine." *Id.* at 687. The four dissenting justices also agreed this was the proper standard of review. *Id.* at 704 n.11 (Brennan, J., dissenting).

Just one month later, this Court used the *de novo* standard of review in the free speech case, *Bose v. Consumers Union of the United States*, 466 U.S. 485 (1984). This Court held that the clearly erroneous standard of review does not apply to a trial court's determination of "special facts that have been deemed to have constitutional significance." *Id.* at 504-05. The holding was based on the principle that "the First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the

common quest for truth and the vitality of society as a whole." *Id.* at 503-04.

Here, the Tenth Circuit considered the findings on each part of the *Lemon* test to be "constitutional facts," and applied the *de novo* standard of review that *Bose* determined is appropriate for *free speech* cases. App. 20a. But this conflicts with at least the Second, Eleventh, and Fifth Circuits.

The Second Circuit rule is that the clearly erroneous standard applies to the secular purpose prong of *Lemon*, but the issue of endorsement is reviewed *de novo*. *Elewski*, 123 F.3d at 53-55. The Fifth Circuit agrees with the Second that the clearly erroneous standard applies to the secular purpose determination. *Croft v. Governor of Texas*, 562 F.3d 735, 742 (5th Cir. 2009). The Eleventh Circuit held in *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263, 1269 (11th Cir. 2008), that the clearly erroneous standard of review applies to appeals of Establishment Clause trials. It was analyzing legislative prayer under *Marsh v. Chambers*, 463 U.S. 783 (1983), but determined whether there was any advancing or disparaging of religion, similar to the second inquiry in *Lemon*. *Id.* at 1277-78.

This disagreement among the circuits as to even what standard of review to apply adds to the cloud of uncertainty currently enshrouding Establishment Clause cases. The *writ* should be granted to clarify this issue as well.

III. THE PLAINTIFFS HAVE NOT PROVED SUFFICIENT FACTS TO ESTABLISH STANDING.

One of the irreducible constitutional minimums to pass the threshold of standing to sue in federal court is that the plaintiff suffer an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The "personal injury [must be] fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997).

Green presented conflicting testimony concerning whether he was primarily opposed to the Monument itself, or to the Commissioners' comments about the Monument. App. 75a.[9] Even if it was the Monument itself, he conceded the historical significance of the Monument, App. 75a, and said his offense stems from a theological disagreement with "terroristic" origins of the Commandments, as reflected in Exodus 20:5, which is not on the Monument. App. 69a. Mr. Green is not coerced to view the Monument when visiting the courthouse since it is situated on the front of the lawn. App. 52a. Most people park in the side or rear lots and can only see the back of the Monument (which contains the Mayflower Compact) as they move from their cars to enter the building. App. 57a, 52a, 63a, 103a. And neither Mr. Green nor his primary witness even noticed when changes were made to the

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[9] If it is merely the statements of Commissioners that gave offense, the only Commissioner who made a statement about his personal religious beliefs passed away, and there would be no remedy a court could award that would redress any alleged harm to the Plaintiff (who has not sought damages).

Monument – a fact that belies both the contention that the monument is unavoidable, and the idea that Mr. Green was suffering any injury whatsoever. App. 69a-70a.

Absent actual coercion, being "offended" by something with which one disagrees should not be sufficient to confer standing on the Plaintiff. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616 (1989).[10] In no other area of the law are plaintiffs allowed this much latitude in proving standing. The general rule is that when plaintiffs allege as injury only that something is happening with which they disagree, the courts refuse to allow standing precisely because it turns the courts into a super-legislature to review generalized grievances with the executive and legislative branches of government where there is no case or controversy involved. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (no standing to challenge reserve membership of Members of Congress as violating the Incompatibility Clause of Art. I, § 6, cl. 2, of the Constitution); *United*

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[10] Esbeck, Carl H., *Why the Supreme Court has Fashioned Rules of Standing Unique to the Establishment Clause* (Oct. 13, 2009), Engage, Vol. 10, p. 83, Oct. 2009; University of Missouri School of Law Legal Studies Research Paper No. 2009-22. Available at SSRN: http://ssrn.com/abstract=1444628 (explaining that "unwanted exposure" standing should be narrowly construed). *See also* Lorence, Jordan and Jones, Allison, *Nothing to Stand On: "Offended Observers" and the Ten Commandments*, Engage, Vol. 6, p. 138, Oct. 2005. Available at http://www.fed-soc.org/publications/pubID.875/pub_detail.asp (arguing that offended observer standing should be abandoned).

States v. Richardson, 418 U.S. 166 (1974) (no standing to challenge reporting rules governing CIA as violation of requirement under Art. I, § 9, cl. 7 of the Constitution for regular statement of account of public funds).

A narrowing of offended observer standing is needed to slow down the current proliferation of lawsuits by plaintiffs who have not been injured in any way that is different than the rest of the population. *See, e.g.*, *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Buono v. Salazar*, 129 S.Ct. 1313 (2009) (argued October 7, 2009) (challenge to a veterans memorial erected on government property and including a cross); *Barnes-Wallace v. City of San Diego*, 530 F.3d 776 (9th Cir. 2008), *petition for cert. filed*, *Boy Scouts of America v. Barnes-Wallace*, 77 U.S.L.W. 3563 (U.S. Mar. 31, 2009) (No. 08-1222) (challenge to Boy Scouts lease of park facilities in San Diego). This expansion of offended observer standing ignores this Court's admonition that "[t]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge*, 454 U.S. at 471. Moreover, a demanding standard for those offended by passive displays would do nothing to raise standing hurdles for those actually coerced by unlawful government action. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577 (1992). Instead, it would limit standing in this context to those with particularized injuries.

Defendants respectfully submit that Mr. Green does not meet the threshold requirement of standing because he only asserted a generalized grievance with the government, and offended observer standing, at

minimum, must be restricted to exclude cases such as this. If the Court does not take up the standing issue in *Buono*, it should do so in the *Boy Scouts of America* case. And if the Court chooses not to address standing in either of those cases, it should consider the matter here.

CONCLUSION

"Even if we can't be sure anymore what legal rule controls Establishment Clause analysis in these cases, we should all be able to agree that cases like *Van Orden* should come out like *Van Orden*." App. 143a (Gorsuch, J., dissenting). The Eighth and Ninth Circuits followed this simple logic, but the Tenth Circuit failed to do so here – creating a circuit split.

The Tenth Circuit is also in conflict with the Second, Sixth, Seventh, and Eighth Circuits in its application of the endorsement test to religious displays. This case presents a straightforward opportunity to resolve these conflicts, and address the recent explosion of Establishment Clause cases resulting from a broad application of offended observer standing.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 06-7098

[Filed June 8, 2009]

JAMES W. GREEN, an individual; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA, a non-profit corporation,	)
Plaintiffs - Appellants,	)
v.	)
HASKELL COUNTY BOARD OF COMMISSIONERS, also known as Board of County Commissioners of Haskell County, Oklahoma; KENNY SHORT, in his official capacity as Chairman of the Haskell County Board of Commissioners,	)
Defendants - Appellees,	)
MAINSTREAM BAPTIST NETWORK; OKLAHOMA MAINSTREAM BAPTISTS;	)

AMERICANS UNITED FOR)
SEPARATION OF CHURCH AND)
STATE; AMERICAN CENTER FOR)
LAW AND JUSTICE; THE)
NATIONAL LEGAL FOUNDATION;)
AMERICAN LEGION # 182; and)
FOUNDATION FOR MORAL LAW,)
)
Amici Curiae.)
)

Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 05-CV-406-RAW)

Daniel Mach, American Civil Liberties Union Foundation, Washington, D.C. (Lane Dilg, American Civil Liberties Union Foundation, Washington, D.C.; Micheal Salem, Salem Law Offices, Norman, Oklahoma; Tina L. Izadi, American Civil Liberties Union of Oklahoma Foundation, Oklahoma City, Oklahoma, with him on the briefs), for Plaintiffs-Appellants.

Kevin H. Theriot (Joel L. Oster, with him on the brief), Alliance Defense Fund, Leawood, Kansas, for Defendants-Appellees.

Harry F. Tepker, University of Oklahoma Law Center, Norman, Oklahoma, filed an amicus curiae brief for Mainstream Baptist Network and Oklahoma Mainstream Baptists in support of Plaintiffs-Appellants.

Ayesha N. Khan, Richard B. Katskee, and Heather L. Weaver, Americans United for Separation of Church

and State, Washington, D.C., filed an amicus curiae brief for Americans United for Separation of Church and State in support of Plaintiffs-Appellants.

Jay Alan Sekulow, American Center for Law & Justice, Washington, D.C.; Francis J. Manion and Geoffrey R. Surtees, American Center for Law & Justice, New Hope, Kentucky, filed an amicus curiae brief for American Center for Law and Justice in support of Defendants-Appellees.

Philip B. Onderdonk Jr., The American Legion, Indianapolis, Indiana; Kelly J. Shackelford and Hiram S. Sasser III, Liberty Legal Institute, Plano, Texas, filed an amicus curiae brief for The American Legion # 182 in support of Defendants-Appellees.

Steven W. Fitschen and Barry C. Hodge, Virginia Beach, Virginia, filed an amicus curiae brief for The National Legal Foundation in support of Defendants-Appellees.

Roy S. Moore, Gregory M. Jones, and Benjamin D. DuPré, Foundation for Moral Law, Montgomery, Alabama, filed an amicus curiae brief for Foundation for Moral Law in support of Defendants-Appellees.

Before **HARTZ**, **O'BRIEN**, and **HOLMES**, Circuit Judges.

HOLMES, Circuit Judge.

Defendant-Appellee Haskell County Board of Commissioners approved a constituent's request to erect a monument displaying the Ten Commandments (hereinafter the "Monument") on the lawn of the

county courthouse in Stigler, Oklahoma. Plaintiffs-Appellants James Green, a Haskell County resident, and the American Civil Liberties Union ("ACLU") of Oklahoma filed suit against the Haskell County Board of Commissioners and Kenny Short, in his official capacity as chairman of that board, (collectively "the Board") under 42 U.S.C. § 1983, alleging a violation of the Establishment Clause of the First Amendment. After a bench trial, the district court ruled in favor of the Board, finding no constitutional violation in the Monument's placement on the courthouse lawn.

Exercising our jurisdiction under 28 U.S.C. § 1291,[1]

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[1] The National Legal Foundation, as amicus curiae, challenges our jurisdiction, arguing that 42 U.S.C. § 1983 is not a proper vehicle to address Establishment Clause violations. Because we are required to ascertain our jurisdiction, we may consider jurisdictional arguments raised by amici. *See Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000). The National Legal Foundation argues that an Establishment Clause violation is not a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" for which § 1983 provides redress. 42 U.S.C. § 1983; Nat'l Legal Found. Amicus Br. at 11. It argues that § 1983 was enacted to vindicate civil rights and that the statute's history, grounded in the history of similar language in the Fourteenth Amendment, demonstrates that "freedom from establishment" was not intended to be treated as such a "right" or one of the Fourteenth Amendment "privileges or immunities" privately enforceable under § 1983. Nat'l Legal Found. Amicus Br. at 6-10.

The Establishment Clause protects religious liberty no less than the Free Exercise Clause does. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (declaring that "the common purpose of the Religion Clauses 'is to secure religious liberty'" (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962))); Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 1

we hold that, under the unique circumstances presented here, the Establishment Clause was violated because the reasonable observer would view the Monument as having the impermissible principal or primary effect of endorsing religion. Accordingly, we **REVERSE** the district court's order.

(observing that "religious liberty is the central value and animating purpose of the Religion Clauses"). The Supreme Court's application of the Establishment Clause to the states through the Fourteenth Amendment implicitly determined that individual rights were at stake. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (noting that "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment," making "the legislatures of the states as incompetent as Congress to enact" laws "respecting an establishment of religion or prohibiting the free exercise thereof"); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (giving "the same application and broad interpretation to the 'establishment of religion' clause" as *Cantwell* had applied to the Free Exercise Clause). And the Supreme Court has rejected the notion that § 1983's scope is limited to civil rights or equal protection laws. *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980) (interpreting the "and laws" portion of § 1983's grant of jurisdiction). In that light, it is unsurprising that both the Supreme Court and this court repeatedly have, without comment, decided § 1983 actions alleging Establishment Clause violations. *See, e.g., McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 852 (2005); *Van Orden v. Perry*, 545 U.S. 677, 682 (2005); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 389 (1993); *Marsh v. Chambers*, 463 U.S. 783, 785 (1983); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1220 (10th Cir. 2005). In sum, we have no basis to doubt our jurisdiction.

I. BACKGROUND[2]

Haskell County has a population of about 15,000 people. Approximately 2500 people live in the county seat, Stigler. The Haskell County courthouse is located in Stigler. It sits in the middle of approximately one square block of county property. The courthouse contains the courts, the offices of numerous government officials, and county offices where citizens can perform a variety of activities such as voting, paying taxes, and accessing public records.

The Haskell County Historical Society occupies a log cabin in the northeast corner of the property. Outside of the courthouse are monuments of various sorts, most of which were paid for and erected by private citizens. One sidewalk contains personal message bricks. Two benches are dedicated to and inscribed by the Classes of 1954 and 1955, respectively. The largest monument—honoring Haskell County citizens who died in World Wars I and II—sits in the middle of the lawn. In front of it are smaller monuments honoring those killed in action in Vietnam and Korea. A small rose garden with a birdbath sits behind the World Wars monument. A monument honoring the Choctaw Nation and a monument honoring all unmarked graves in Haskell County also are situated on the courthouse lawn.

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[2] Our recitation of the facts relies largely on the district court's factual findings in its opinion issued after the bench trial. *See Green v. Bd. of County Comm'rs of County of Haskell*, 450 F. Supp. 2d 1273 (E.D. Okla. 2006).

At issue is a recent addition to the lawn—a block of stone that is approximately eight feet tall and three feet wide, with the Ten Commandments inscribed on one side and the Mayflower Compact on the other. Photographs of the two sides of the Monument are appended to this opinion as Appendix A (Ten Commandments) and Appendix B (Mayflower Compact). The side facing the street reads:

The Ten Commandments

I Thou shalt have no other gods before me.
II Thou shalt not make unto thee any graven image.
III Thou shalt not take the name of the Lord thy God in vain.
IV Thou shalt remember the sabbath day and keep it holy.
V Thou shalt honor thy father and mother.
VI Thou shalt not kill.
VII Thou shalt not commit adultry. [sic]
VIII Thou shalt not steal.
IX Thou shalt not bear false witness against thy neighbor.
X Thou shalt not covet thy neighbor's house.

Exodus 20

App. at 1569.

The opposite side of the Monument reads, in all capital letters:

The Mayflower Compact
November 11, 1620

In the name of God, Amen.

We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James by the grace of God, of Great Britain, France and Ireland king, defender of the faith, ect. [sic], having undertaken, for the glory of God, and advancement of the Christian faith, and honor of our king and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents solemnly and mutually in the presence of God, and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.

In witness whereof we have hereunder subscribed our names at Cape-Cod the 11 of November, in the year of the reign of our sovereign lord, King James, of England, France, and Ireland the eighteenth, and of Scotland the fifty-fourth. Anno Domini 1620.

App. at 1566. At the base of the Monument is a notation added after the start of this litigation:

"Erected by Citizens of Haskell County." App. at 1085; *see Green*, 450 F. Supp. 2d at 1277-78.

The Monument's saga began when Michael Bush, a local citizen who is employed as a construction worker and part-time minister, appeared at a regularly scheduled Board meeting to seek approval for placing a Ten Commandments monument on the courthouse lawn. At that time, the Board consisted of three commissioners. After a brief discussion, they approved Mr. Bush's request. The relevant portion of the meeting's minutes reads: "The Board met with Mike Bush to discuss getting a monument with the 10 Commandments on it to put on the courthouse lawn. The Board agreed that Mike could go ahead and have the monument made and Mike is taking care of all the expense." App. at 1388.

Mr. Bush recalled telling the Board that "the Lord had burdened [his] heart" to create the Monument and that he would be responsible for raising the funds and getting the Monument. App. at 1013. He did not present the Board with any diagram of his proposal, although he did describe its proposed size and that it would depict the Ten Commandments. Mr. Bush did not recall being asked any questions before the Board approved his request. One of the commissioners recalled discussing the historical aspects of the Monument with the other commissioners but could not recall any more specific contents of that discussion. Either prior to or shortly after the vote, the Board consulted with the County's attorney, who informed them that a decision to approve the Monument could result in a few legal "bumps." App. at 516, 1148.

After receiving approval from the Board, Mr. Bush raised the necessary funds through religious groups in the community. With the assistance of a friend, Mr. Bush decided on the wording of the Ten Commandments to appear on the Monument, condensing and paraphrasing from the King James Version of the Bible.[3] At some point in the process of designing the Monument, Mr. Bush decided to include the Mayflower Compact as well. As it relates to the Ten Commandments, the Board did not review or

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[3] In our subsequent legal analysis, we place no significance on the fact—suggested by the district court, *Green*, 450 F. Supp. 2d at 1277-78 & n.7—that this may be "a butchered paraphrase" of the King James Version. *Id.* at 1278. Along with numerous other considerations, we focus on the Monument's text (irrespective of its biblical pedigree) and its likely effect on a reasonable observer. According to Mr. Green, the *particular version* of the Ten Commandments inscribed on the Monument is "uniquely Christian" and "contains expressly sectarian and religious commands, such as observing the Sabbath, not worshiping idols, believing in a deity, and not taking a deity's name in vain." App. at 22. Mr. Green apparently seeks to draw a beneficial contrast with monuments found in other Ten Commandments cases that purport to depict a more interfaith version of the Ten Commandments. *See ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 774 n.2 (8th Cir. 2005) (en banc) ("The monument lists eleven commands ostensibly to serve as an amalgamation of the Jewish, Protestant, and Catholic versions of the Ten Commandments."); *Books v. City of Elkhart, Ind.*, 235 F.3d 292, 294 (7th Cir. 2000) ("[R]epresentatives of Judaism, Protestantism, and Catholicism developed what the individuals involved believed to be a nonsectarian version of the Ten Commandments because it could not be identified with any one religious group."). However, we offer no view concerning the validity of Mr. Green's characterization of the version of the Ten Commandments inscribed on the Monument. In our view, this factor is not a material consideration in our disposition under the facts of this case.

approve Mr. Bush's design of the Monument or the version of the Ten Commandments that he selected to be inscribed on it. With regard to the Mayflower Compact, the Board apparently was not apprised of Mr. Bush's plan to add it to the Monument and did not authorize him to do so.[4]

The Board, however, did select the location for the monument—in line with several of the other monuments on the lawn, approximately twenty-five feet away from Highway 9 (the main thoroughfare through town, which runs in front of the courthouse), five feet over from the unmarked graves monument, and fifty feet from the World Wars monument in the center of the lawn. The location does not appear to be "a clearly high traffic area" and not "the most frequented route taken to the courthouse by citizens going there to undertake business." *Green*, 450 F. Supp. 2d at 1294. A sketch of the courthouse lawn that sheds some light on the Monument's location and its spatial relationship with the other monuments is appended to this opinion as Appendix C. *See id.* at 1277 n.6 (describing the sketch and noting that "a not-to-scale diagram showing the approximate location of the monuments on the lawn was helpful and was admitted" into evidence).

On November 5, 2004, the Monument actually was placed on the lawn. It remained covered until a

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[4] Although the district court found that the record was "irredeemably ambiguous" concerning whether the Board knew about or approved the addition of the Compact, the court ultimately was "not convinced" that the Board "ever officially approved the addition of the Compact." *Green*, 450 F. Supp. 2d at 1291 n.30.

dedication ceremony was held on Sunday, November 7. This ceremony was organized by Mr. Bush, who informed the churches that had participated in the fundraising effort for the Monument that it would be taking place. One to two hundred people, including two of the three commissioners, attended the ceremony, and seventeen churches were represented. The ceremony, which lasted for about one hour, opened with a prayer and included remarks by local pastors. Mr. Bush also explained how the Monument came to be on the courthouse lawn. Although Mr. Bush recalled that the commissioners also said a few words, neither commissioner recalls doing anything other than attending the ceremony.

For several months following its unveiling, the Monument attracted significant media attention. Photographs of commissioners posing near the Ten Commandments appeared in newspapers distributed in Haskell County. In some of the photographs, two of the three commissioners were present. And, in at least one photograph, all three were present. That photograph (featuring all three commissioners) was introduced into evidence and is appended to this opinion as Appendix D. At least two of the commissioners expressed a recognition that they were asked by the media to participate in the photographs because of their status as commissioners.

The media also quoted the commissioners making statements about the Monument. In November 2004, one commissioner, referring to the Ten Commandments, stated: "That's what we're trying to live by, that right there . . . . The good Lord died for me. I can stand for him, and I'm going to. . . . I'm a Christian and I believe in this. I think it's a benefit to

the community." App. at 455. Around the same time, that commissioner (in substance) told another media outlet: "God died for me and you, and I'm going to stand up for him." App. at 458-59.

Mr. Green and the ACLU of Oklahoma filed suit on October 6, 2005, alleging that the display of the Ten Commandments on the courthouse lawn violated the Establishment Clause. They sought a declaration that the Ten Commandments display was unconstitutional and also "prospective injunctive relief, requiring Defendants to remove the large religious monument from the lawn of the Haskell County Courthouse." App. at 16-17. They did not assert a claim for monetary relief.

Mr. Green stated that he was offended by what he perceived as the Monument's mandates because he does "not feel that [he] should be told [he is] bound by them," as they did not come through the democratic process, and because he "subscribe[s] to the later teachings of Jesus" and rejects this text from "a period of harsh, almost terroristic origins." App. at 946. He was concerned by the commissioners' statements about the Monument because "they seemed to be strongly supporting the religious aspects of the monument as a body," and he fears that he will be "treated differently and more harshly" because he does not "subscribe to a particular faith that is represented by this monument." App. at 938-39, 951. He said that he cannot avoid the Monument when he conducts his business at the courthouse.

Following the initiation of this lawsuit, Mr. Bush organized a rally and circulated a petition to support the Monument. To advertise the rally, posters

encouraged community members to "Support the Ten Commandments Monument" and depicted a young girl praying before an American flag with the caption "One Nation Under God." App. at 1409, 1534. One such poster was placed on the front door of the courthouse. The rally was held on the courthouse lawn on November 19, 2005, and attended by approximately three to four hundred people. There were a number of speakers at the rally, including local pastors and a U.S. Senator. One commissioner acknowledged saying at the rally, in effect, "I'll stand up in front of that monument and if you bring a bulldozer up here you'll have to push me down with it." App. at 1405, 1186; *see also Green*, 450 F. Supp. 2d at 1280 (noting that "[n]o recording exists" of the commissioner's statement but he "was reported to have said something like" the bulldozer comment). Furthermore, on May 6, 2006, the Board enacted a policy that prohibited Haskell County from denying placement of a display on the courthouse lawn based on viewpoint.

The district court held a two-day bench trial in May 2006. After reviewing the evidence presented and visiting the Haskell County Courthouse to view the Monument, the district court found in favor of the defendants. This appeal followed.

II. DISCUSSION

A. Standing

"Because it involves the court's power to entertain the suit, constitutional standing is a threshold issue in every case before a federal court." *O'Connor*, 416 F.3d at 1222. We review the question of whether a plaintiff has constitutional standing de novo. *United States v.*

$148,840 in U.S. Currency, 521 F.3d 1268, 1273 (10th Cir. 2008). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must have suffered a concrete, actual "injury in fact." *Id.* Second, there must be a causal connection between the injury and the conduct at issue. *Id.* Third, it must be likely that a favorable decision will redress the plaintiff's injury. *Id.* at 561. Mr. Green meets all three requirements.[5]

In the context of alleged Establishment Clause violations, a plaintiff may establish non-economic injury if "'directly affected by the laws and practices

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[5] The district court determined that the ACLU of Oklahoma lacked standing for failure to allege all the elements required of an associational plaintiff. *Green*, 450 F. Supp. 2d at 1286 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Plaintiffs-Appellants do not challenge this conclusion in any substantial fashion, only noting in a footnote that "although it is unnecessary for this appeal, the ACLU of Oklahoma also has constitutional standing to challenge the display," and arguing that we should take judicial notice of the organization's readily identifiable mission. Aplt. Opening Br. at 22 n.7. Because we conclude that Mr. Green has standing, we agree that it is unnecessary to address the ACLU of Oklahoma's standing. However, to the extent that Plaintiffs-Appellants intended to challenge the district court's exclusion of the ACLU of Oklahoma, their argument is inadequately raised for appellate review, and we will not address it. *See United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived."). Furthermore, as the party invoking federal jurisdiction, the ACLU of Oklahoma must do more than describe its objection to the district court's determination; to carry its burden, it must establish each element of standing. *Lujan*, 504 U.S. at 561. Thus, we review only the Board's challenge to Mr. Green's standing.

against which their complaints are directed.'" *O'Connor*, 416 F.3d at 1222-23 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 n.22 (1982)). Although "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not a sufficient injury in fact, *Valley Forge*, 454 U.S. at 485, we have held that "[a]llegations of personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury." *O'Connor*, 416 F.3d at 1223 (citing *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989)); *Weinbaum v. City of Las Cruces, N.M.*, 541 F.3d 1017, 1028 (10th Cir. 2008) (restating *O'Connor*'s rule that in Establishment Clause cases, such allegations of personal contact are sufficient to demonstrate direct injury); *see also Vasquez v. L.A. County*, 487 F.3d 1246, 1252 (9th Cir. 2007) ("We note that the majority of other circuits that have considered the issue have held spiritual harm resulting from one's direct contact with an offensive religious (or anti-religious) symbol to be a sufficient basis to confer Article III standing.").

In *O'Connor*, plaintiffs had to walk past the offensive statue "almost every week" or alter their routes across campus. *O'Connor*, 416 F.3d at 1223. In *Weinbaum*, the plaintiffs alleged that they had direct contact with the cross symbol that the city used as its seal, in that it was conspicuously displayed on city property. *Weinbaum*, 541 F.3d at 1028. In *Foremaster*, plaintiff alleged that he was "confronted by the [offending city] logo on a daily basis." *Foremaster*, 882 F.2d at 1491. Mr. Green testified that he visits the Haskell County Historical Society on a weekly basis and that business occasionally takes him to the

courthouse. Further, Mr. Green testified that whenever he visits the courthouse square for either purpose, he cannot avoid the Monument. We conclude that Mr. Green's statements are sufficient to establish that he is being "frequently brought into direct and unwelcome contact with" the structure allegedly giving rise to the Establishment Clause violation (i.e., the Monument). *O'Connor*, 416 F.3d at 1223. Thus, Mr. Green meets the injury-in-fact requirement of standing.

The second element of constitutional standing, a causal connection, is not disputed and is easily met here: Mr. Green's Establishment Clause claim is based on the Board's approval of and support for the Monument that allegedly caused his injury. Turning to the third element, the Board argues that Mr. Green's injury cannot be redressed by a favorable decision because his argument should be construed as primarily evidencing an opposition to the *comments* that certain commissioners made regarding the Monument, not the *Monument* itself, and that Mr. Green has not sought damages or an injunction restricting such statements by the commissioners.

This argument must fail. While the district court did note that there were inconsistencies in Mr. Green's testimony as to whether he was more offended by the Monument itself or by commissioners' statements about the Monument, *Green*, 450 F. Supp. 2d at 1282, from the outset of the lawsuit Mr. Green has challenged the Monument, and his alleged injury in that regard is redressable. While Mr. Green might not have a remediable injury if he were objecting to the past comments of commissioners in isolation, it is the Monument itself that gave rise to his Establishment

Clause challenge, and Mr. Green primarily referred to the comments because they (allegedly) indicate governmental endorsement of religion through the Monument. The court-ordered removal of the Monument that Mr. Green seeks would redress his injury. Accordingly, we conclude that Mr. Green has standing to bring his claim.

B. Mootness

Like standing, mootness is a threshold inquiry. *Navani v. Shahani*, 496 F.3d 1121, 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1232 (2008); *see Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (noting that "the court must determine whether a case is moot before proceeding to the merits"). "A case or controversy must remain alive throughout the litigation, including on appellate review." *Navani*, 496 F.3d at 1127. "If, during the pendency of the case, circumstances change such that the plaintiff's legally cognizable interest in a case is extinguished, the case is moot, and dismissal may be required." *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1245 (10th Cir. 2009). The Board argues that its new policy that prohibits Haskell County from denying placement of a display on the courthouse lawn based on viewpoint constitutes just such a circumstance, rendering this case moot.

"In deciding whether a case is moot, '[t]he crucial question is whether granting a present determination of the issues offered . . . will have some effect in the real world.'" *Id.* at 1246 (alteration in original) (quoting *Davidson*, 236 F.3d at 1182); *see Phelps v. Hamilton*, 122 F.3d 885, 891 (10th Cir. 1997) (noting that the "inability to grant effective relief renders" an

issue moot). To the extent that the Board characterizes this case as merely a challenge to the unwritten policy regarding placement of displays on the courthouse lawn, the assertion is belied by the very portion of the complaint that they cite. It charges that the Board's "'acts, practices, and policies constitute an impermissible endorsement.'" Aplee. Br. at 25 (quoting App. at 25). The Board's implementation of its May 2006 policy does not alter the previous actions of the Board; nor does it change the Board's alleged endorsement of religion through the Monument. Mr. Green has sought a declaration that Board's actions resulting in the erection of the Ten Commandments display were unconstitutional. *See* App. at 731 (amended pretrial order noting that plaintiffs "seek declaratory relief that the Ten Commandments Monument and its placement on Haskell County Courthouse law violates the Establishment Clause").

Moreover, insofar as the Board's mootness assertion rests on the ground that, regardless of the outcome of this case, its 2006 written policy would oblige it to accept an identical monument for display, the assertion is untenable. The possibility that a future monument installed under different circumstances might pass constitutional muster does not moot the present case. We are unable to decide that hypothetical case on the facts before us. *See O'Connor*, 416 F.3d at 1222 ("Although it is conceivable that the university could bring some other religiously themed statue onto campus as part of a future sculpture exhibition, this court cannot resolve the constitutionality of a hypothetical future statue given that Establishment Clause questions are heavily dependent on the specific context and content of the display."). The Monument remains on the courthouse

lawn; at bottom, Mr. Green's lawsuit seeks its removal. Therefore, Mr. Green has a legally cognizable interest in this litigation's outcome. For the foregoing reasons, then, we conclude that this case presents a live case or controversy and is not moot.

C. Establishment Clause Claim

1. Standard of Review

Ordinarily, we "review the district court's factual findings, made after a bench trial, for clear error[,] and its legal conclusions *de novo*." *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 1001 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2872 (2008); *see also* Fed. R. Civ. P. 52(a)(6).[6] However, in a First Amendment case, we have an "obligation to make an independent examination of the whole record." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1230 n.7 (10th Cir. 1998) (en banc) (internal quotation marks omitted) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)); *Weinbaum*, 541 F.3d at 1029. "We review *de novo* a 'district court's finding of constitutional fact' and its 'ultimate conclusions' regarding a First Amendment challenge."[7] *Weinbaum*,

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[6] Rule 52(a)(6) provides: "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."

[7] In *Bose*, the Supreme Court concluded that "the strictures of Federal Rule of Civil Procedure 52(a) did not apply to a district court's conclusion that an alleged libeler had 'actual malice' because the determination was a 'First Amendment question[] of constitutional fact.'" *United States v. Friday*, 525 F.3d 938, 949

541 F.3d at 1029 (quoting *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 922 (10th Cir. 2002)). More specifically, in Establishment Clause cases, we consider "a district court's findings on each part of the *Lemon* test" to be "constitutional facts." *Robinson v. City of Edmond*, 68 F.3d 1226, 1230 n.7 (10th Cir. 1995) (applying the test derived from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). We must still give "due regard," however, to the trial judge's opportunity to observe the demeanor of witnesses. *Bose*, 466 U.S. at 499-500, 514.

Furthermore, our searching review of the record with regard to "constitutional facts" does not alter our ordinary clearly-erroneous review of the district court's other factual findings. *See id.* at 514 n.31 ("The independent review function is not equivalent to a 'de novo' review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff."). "[T]he special *Bose* rule applies only to 'constitutional facts' and not to the basic historical facts upon which the claim is grounded, which are subject to the usual 'clearly erroneous' standard of review." *Friday*, 525 F.3d at 950 (applying *Bose* to a Free Exercise Clause claim). While it may be difficult at times to distinguish historical facts from constitutional facts, we will give deference to the district court's ordinary factual findings and more closely review its conclusions about "purpose," "effect," and "entanglement."

(10th Cir. 2008) (quoting *Bose*, 466 U.S. at 508 n.27), *cert. denied*, 129 S. Ct. 1312 (2009); *see generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229 (1985).

2. *The* Lemon *Test*

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Like other provisions of the First Amendment, they are applied to the states under the Fourteenth Amendment. *Cantwell*, 310 U.S. at 303. "Despite scattered signals to the contrary, the touchstone for Establishment Clause analysis remains the tripartite test set out in *Lemon*." *Weinbaum*, 541 F.3d at 1030 (footnote omitted); *see Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1258-59 (10th Cir. 2005) (noting that we deem the *Lemon* test to be the "traditional standard" for evaluating Establishment Clause claims). Under that test, to avoid an Establishment Clause violation, the challenged government action (1) must have a secular legislative purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. *Utah Gospel Mission*, 425 F.3d at 1259 (citing *Lemon*, 403 U.S. at 612-13).

Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), offered "a refined version of the *Lemon* test" implicating its purpose and effect elements that has been repeatedly used in this circuit. *O'Connor*, 416 F.3d at 1224 ("In examining challenges to government action under the Establishment Clause, this circuit has interpreted the purpose and effect prongs of *Lemon* in light of Justice O'Connor's endorsement test."); *see Weinbaum*, 541 F.3d at 1030; *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 551

(10th Cir. 1997). This "endorsement test" holds that "the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *Bauchman*, 132 F.3d at 551 (internal quotation marks omitted).

We are obliged here to apply the *Lemon* test, with Justice O'Connor's endorsement patina. *See Weinbaum*, 541 F.3d at 1030 (noting our obligation to apply the "hybrid *Lemon*/endorsement test"); *O'Connor*, 416 F.3d at 1224 ("This court will therefore continue to apply the *Lemon* test as modified by Justice O'Connor's endorsement test, while remaining mindful that there is 'no test-related substitute for the exercise of legal judgment.'" (quoting *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring)).[8] A governmental

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[8] A plurality of the Supreme Court has (a) concluded that the *Lemon* test is "not useful in dealing with the sort of passive [Ten Commandments] monument that Texas has erected on its Capitol grounds," (b) disregarded the endorsement test, and (c) instead employed an analysis "driven both by the nature of the monument and by our Nation's history." *Van Orden*, 545 U.S. at 686 (plurality opinion). Justice Breyer concurred in the judgment, noting that "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case" and declaring that in borderline cases there is "no test-related substitute for the exercise of legal judgment." *Id.* at 699-700 (Breyer, J., concurring). In *Weinbaum*, we observed that certain Supreme Court Justices have "harshly criticized" the *Lemon* test. *Weinbaum*, 541 F.3d at 1030 n.14. However, we ultimately concluded that we are still obliged to apply *Lemon*, as refined by Justice O'Connor's endorsement test: "[T]he Lemon test clings to life because the Supreme Court, in the series of splintered Establishment Clause cases since *Lemon*, has never explicitly overruled the case. While the Supreme Court may be free to ignore *Lemon*, this court is not." *Id.* (citation omitted); *see also*

Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After* McCreary *and* Van Orden, 32 Harv. J.L. & Pub. Pol'y 231, 246 (2009) [hereinafter Clement, *Public Displays*] ("Most courts of appeals have concluded that the *Lemon* tripartite test of purpose, effect, and entanglement still stands after *Van Orden*, yet this conclusion has not come without a struggle."). Therefore, we cannot do as the Board wishes, *see* Aplee. Br. at 38, 45-46 n.21, and be guided in our analysis by the *Van Orden* plurality's disregard of the *Lemon* test.

The Board also has argued that Establishment Clause jurisprudence should not apply here at all and that this case should be analyzed under the legal framework of the Free Exercise Clause. "The Free Speech Clause restricts government regulation of *private* speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1131 (2009) (emphasis added). As a logical and necessary support for its argument, the Board thus maintains that the Monument should be viewed as private speech rather than government speech. The Supreme Court's recent *Pleasant Grove* decision, however, forecloses this argument. There, the Court held that "[p]ermanent monuments displayed on public property typically represent government speech" and, therefore, Free Exercise Clause jurisprudence is inapposite. *Id.* at 1132. The Board notes that the Supreme Court did not say that *all* permanent monuments constitute government speech—just that they *typically* do—and that the Board has intentionally opened a limited public forum for monuments on the courthouse lawn. We are hard-pressed to view the circumstances here as resembling the "limited circumstances in which the forum doctrine might properly be applied to a permanent monument," as described by the *Pleasant Grove* Court. *Id.* at 1138 (noting that such "limited circumstances" might be present, "for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message"). This is simply not one of those "situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.* at 1132. However, as the Court noted: "This does not mean that there are no restraints on

action violates the Establishment Clause if it fails to satisfy *any* of three prongs of the *Lemon* test. *See Utah Gospel Mission*, 425 F.3d at 1259 ("Thus, to succeed, Plaintiffs must allege facts which suggest a violation of *any* part of the [*Lemon*] analysis." (emphasis added)); *Bauchman*, 132 F.3d at 551 (noting that governmental action does not run afoul of the Establishment Clause "so long as" it satisfies all three prongs of the *Lemon* test); *see also O'Connor*, 416 F.3d at 1224 (relying on *Bauchman* in noting the need for the challenged governmental action to satisfy all three *Lemon* prongs).

Mr. Green's arguments do not implicate the third prong of the *Lemon* test. That is, Mr. Green does not contend on appeal that the Board's conduct in relation to the Ten Commandments display fosters an excessive government entanglement with religion. He does argue, however, that the Board's conduct in connection with the Ten Commandments display fails to satisfy *Lemon*'s first and second prongs. For the reasons stated below, we ultimately conclude that the Board's action does violate the Establishment Clause with respect to the second prong. In other words, we conclude that the principal or primary effect of the Board's action is to endorse religion or a particular form of religion. Accordingly, we need not (and do not)

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government speech. For example, government speech must comport with the Establishment Clause." *Id.* at 1131-32; *see id.* at 1139 (Stevens, J., concurring) ("For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."). And it is the propriety of the Board's action under the Establishment Clause that is properly before us here.

opine on whether the Board's action satisfies the first *Lemon* prong (i.e., whether the Board's purpose was secular).

3. Application

i. The Monument Is Not Presumptively Unconstitutional

"Establishment Clause cases are predominantly fact-driven . . . ." *Weinbaum*, 541 F.3d at 1022. We reject at the outset Mr. Green's argument that "[g]overnmental [d]isplays of the [t]ext of the Ten Commandments [a]re [p]resumptively [u]nconstitutional." Aplt. Opening Br. at 24. In *Stone v. Graham*, 449 U.S. 39, 41 (1980), the Supreme Court observed that "[t]he preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." In *McCreary*, the Court construed that language to mean that isolated exhibition in public school classrooms "could presumptively be understood as meant to advance religion." *McCreary*, 545 U.S. at 867. However, *McCreary* did not adopt a general presumption outside of that school context: Specifically, it noted that "*Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key." *Id.*; *see also Van Orden*, 545 U.S. at 690-91 (construing *Stone* as an example of "particular[] vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools" (internal quotation marks omitted)); *id.* at 703 (Breyer, J., concurring) (distinguishing *Stone* on the basis that "given the impressionability of the young, government

must exercise particular care in separating church and state" on the grounds of a public school).

The Ten Commandments have a secular significance that government may acknowledge. *See Van Orden*, 545 U.S. at 688-89 (plurality opinion) (providing examples showing that "acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America" and observing that the Court's "opinions, like our building, have recognized the role the Decalogue plays in America's heritage"); *id.* at 701 (Breyer, J., concurring) (noting that in certain contexts the Commandments can convey "a secular moral message . . . about proper standards of social conduct" or a message "about a historic relation between those standards and the law"). Like the *McCreary* Court, we are unwilling to presume that the text of the Ten Commandments here could not be constitutionally integrated into a governmental display that highlights its secular significance. *See McCreary*, 545 U.S. at 874 (expressly declining to hold that "a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history").[9] Accordingly, we reject Mr. Green's contention that we should deem the Board's display of the Monument as presumptively unconstitutional

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[9] In fact, the closest the *McCreary* Court came to a presumption against a display of the Ten Commandments is its conclusion that "a religious object is unmistakable" when "the government initiates an effort to place this statement alone in public view." 545 U.S. at 869. Because this case involves neither government initiation nor an isolated display, we are on firm footing in reviewing this case without adopting a presumption against the Monument.

because the Monument is inscribed with the Ten Commandments.

ii. The Monument's Effect

Governments may not "mak[e] adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). And actions which have the effect of communicating governmental endorsement or disapproval, "whether intentionally or unintentionally, . . . make religion relevant, in reality or public perception, to status in the political community." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). In applying the effect prong, we "evaluate whether a reasonable observer, aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval." *Bauchman*, 132 F.3d at 551-52 (internal quotation marks omitted). "However, not every governmental activity that confers a remote, incidental or indirect benefit upon religion is constitutionally invalid." *Id.* at 555. Rather, it must be established that the governmental activity has "a *princip[al]* or *primary* effect of advancing or endorsing religion." *Id.*

In *Weinbaum*, we noted that application of the effect prong of the *Lemon* test to a particular set of facts "involves an objective inquiry." *See Weinbaum*, 541 F.3d at 1031; *cf. Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008) (viewing the endorsement analysis as constituting a distinct Establishment Clause test but noting that "[t]he test

does not focus on the government's subjective purpose when behaving in a particular manner, but instead focuses on the perceptions of the reasonable observer"), *cert. denied*, 129 S. Ct. 1524 (2009). We proceeded then to offer a useful summary of the nature of the inquiry:

> [T]he "effect" prong looks through the eyes of an objective observer who is aware of the purpose, context, and history of the symbol. The objective or reasonable observer is kin to the fictitious "reasonably prudent person" of tort law. So we presume that the court-created "objective observer" is aware of information "not limited to the information gleaned simply from viewing the challenged display." If a government symbol has long gone unchallenged, there is a suggestion that an objective observer would not think that the symbol endorses a religious message.

Weinbaum, 541 F.3d at 1031 (citations and footnote omitted) (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996); *O'Connor*, 416 F.3d at 1228).

In this inquiry, "[u]ndoubtedly, the 'objective observer' is presumed to know far more than most actual members of a given community." *Id.* at 1031 n.16. "[R]easonable observers have reasonable memories" and are aware of "the context in which the policy arose." *McCreary*, 545 U.S. at 866 (alteration and internal quotation marks omitted). However, we do not treat the reasonable observer as omniscient. *See, e.g.*, *Bauchman*, 132 F.3d at 560 (concluding that courts "impart[] such knowledge to the reasonable observer in the broad sense of community awareness, not in the sense that a reasonable observer would have

knowledge of every alleged past constitutional violation of a particular defendant").

Consistent with the fact-intensive nature of this effect inquiry, "the Supreme Court has advised that, in Establishment Clause cases, 'the inquiry calls for line drawing; no fixed, *per se* rule can be framed.'" *Weinbaum*, 541 F.3d at 1039 (quoting *Lynch*, 465 U.S. at 678)). A challenged government action that might pass constitutional muster in some settings might be deemed "constitutionally suspect in some other American communities or in other contexts." *Id.*; *cf. Borden*, 523 F.3d at 158-59, 178 (holding that "when viewing the acts [i.e., "silent acts of bowing his head during his team's pre-meal grace and taking a knee with his team during a locker-room prayer"] in light of [plaintiff coach's] twenty-three years of prior prayer activities with the East Brunswick High School football team during which he organized, participated in, and even led prayer activities with his team, a reasonable observer would conclude that [plaintiff] was endorsing religion when he engaged in these acts," but noting that "this conclusion would not be so clear" without these "twenty-three years of prior prayer activities"). "Context carries much weight in the Establishment Clause calculus." *Weinbaum*, 541 F.3d at 1033.

Thus, the reasonable observer in this case would be aware of the nature and history of the Haskell County community, the circumstances surrounding the Monument's placement on the courthouse lawn, its precise location on the lawn and its spatial relationship to the other courthouse monuments, and also the Haskell County community's response to the Monument. In particular, the reasonable observer

would be aware of Mr. Bush's religious motivation for seeking the erection of the Monument. After learning of these motivations, the Board swiftly approved its erection and allowed the project to go forward, despite being aware that there might be adverse legal consequences.[10] And, when those adverse legal

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[10] To be clear, the focus is on the government actor's conduct rather than the private citizen's. In connection with *Lemon*'s purpose prong, this is probably most patent. *See Weinbaum*, 541 F.3d at 1031 ("[W]e must scrutinize the *government's* intent; thus, where the challenged conduct is the selection or display of artwork, the artist's inspiration or intent is irrelevant."); *Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002) ("The purpose inquiry, however, centers not on the purpose animating the speech of a particular private actor . . . but, rather, on the purpose for which the *government* allows such speech on government property."); *cf. Borden*, 523 F.3d at 175 (noting that "[t]he [endorsement] test does not focus on the government's subjective purpose when behaving in a particular manner, but instead focuses on the perceptions of the reasonable observer"). Therefore, the subjective motivation of Mr. Bush per se, in the purpose inquiry, is essentially irrelevant. However, as to the effect prong, things are not that simple. Under the effect prong, although the area of concern is still the government actor's conduct—that is, its effect—the analysis must undertake a significant inquiry into the surrounding circumstances of which the reasonable observer would have been aware. And, here, the reasonable observer would have been aware of the circumstances under which the Monument came to sit on the courthouse lawn, including the fact that Mr. Bush revealed to the Board his unalloyed religious motivation in seeking to put the Monument there and that the Board in short order agreed to allow him to erect it. The reasonable observer would be very unlikely in the effect analysis to give the Board's agreement determinative weight as an endorsement of religion. However, in light of Mr. Bush's expressed views, the reasonable observer could not negate this circumstance as one in the totality of circumstances that was consistent with a conclusion that the Board's conduct had the effect of endorsing religion. This is something that the reasonable

consequences did in fact materialize in the form of Mr. Green's lawsuit, the Board seemingly did not hesitate to stay the course, electing to maintain the Monument without clarifying its purposes in doing so. Further, although the Monument ultimately also was inscribed with the Mayflower Compact, the Board approved the Monument with the understanding that it would be inscribed only with the Ten Commandments.

Haskell County is a place where "[e]veryone knows each other." *Green*, 450 F. Supp. 2d at 1274. The Board members were identifiable as Board members. Indeed, one commissioner noted that Board members act as county officials "24 hours a day, 7 days a week." App. at 535. Mr. Bush also testified that everyone would know the commissioners and they would not have to be identified for people to know their position.

The reasonable observer would know that two of the three commissioners attended the unveiling of the Monument, which had been organized by Mr. Bush and included remarks by local pastors. *See Green*, 450 F. Supp. 2d at 1291 n.30 ("[E]veryone knows each other[,] and word travels in Haskell County faster than the constant airspeed of a European swallow."). Mr. Bush specifically recalled both of the

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observer would have been more readily able to do if Mr. Bush, for example, had voiced a historical or other secular purpose for the installation of the Monument. *Cf. Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) (noting that, given the Fraternal Order of Eagles's civic-education purposes aimed at fighting juvenile delinquency, "[t]he circumstances surrounding the display's placement on the capitol grounds," *inter alia*, "suggest that the State itself intended the latter, nonreligious aspects [of the Ten Commandments] tablets' message to predominate").

commissioners speaking at the unveiling. Those commissioners posed for photographs beside the Monument, which appeared in locally distributed newspapers. After this lawsuit began, Mr. Bush organized a religiously themed rally to support the Monument, which gathered a crowd of three to four hundred people. The same two commissioners attended. One of them spoke briefly in support of the monument, and he is reported to have said, "I'll stand up in front of that monument and if you bring a bulldozer up here you'll have to push me down with it." App. at 1405, 1186; *see also Green*, 450 F. Supp. 2d at 1280.

Numerous quotes from these commissioners appear in news reports, ranging from statements reflecting their determination to keep the Monument, *see* App. at 459 ("I won't say that we won't take it down, but it will be after the fight."), to statements of religious belief, *see, e.g.*, App. at 455 ("That's what we're trying to live by, that right there." "The good Lord died for me. I can stand for him. And I'm going to." "I'm a Christian and I believe in this. I think it's a benefit to the community."); App. at 458-59 ("God died for me and you, and I'm going to stand up for him."). We conclude, in the unique factual setting of a small community like Haskell County, that the reasonable observer would find that these facts tended to strongly reflect a government endorsement of religion. In particular, we find support for this conclusion in the public statements of the Haskell County commissioners. In none of their statements did the commissioners attempt to distinguish between the Board's position and their own beliefs. Several of the commissioners' statements would naturally be construed as having been made on behalf of the Board, including, "I won't

say that *we* won't take it down, but it will be after the fight," App. at 459 (emphasis added), and "*We're* definitely going to leave our monument there until the law tells *us* to take it down." App. at 1170 (emphasis added). By not distinguishing their personal opinions from their official views, the commissioners left the impression that a principal or primary reason for the erection and maintenance of the display was religious. *See, e.g.*, App. at 458-59 (where one commissioner's statement that "God died for me and you, and I'm going to stand up for him" appeared in close proximity to the statement "I won't say that we won't take it down, but it will be after the fight").

Nor did the Board "act[] affirmatively to discourage any mistaken impression that private speakers [were] speaking for the Board." *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 281 (4th Cir. 1998). Such action or inaction has been found significant in the Establishment Clause context. *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (holding that government neutrality was apparent where "the government ha[d] not fostered or encouraged any mistaken impression that" the private speech was the university's own (internal quotation marks omitted)); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (rejecting the idea that the distinction between private and government speech "disappears when the private speech is conducted too close to the symbols of government," "at least where, as here, the government has not fostered or encouraged the mistake"); *Bd. of Educ. v. Mergens ex rel. Mergens*, 496 U.S. 226, 251 (1990) (rejecting the "fear of a mistaken inference of endorsement" because the school had the capacity to make clear that "its recognition of [a student religious]

club is not an endorsement of the view of the club's participants" and to the extent that it did so, "students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech"). Furthermore, the photographs of commissioners standing beside the Monument—at least one depicting all three commissioners—give the impression of the Board's united endorsement of the Monument itself. Indeed, at least two of the commissioners expressly recognized that they were asked by the media to participate in the photographs because of their status as commissioners.

Like the Eighth Circuit, we "do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards." *Clayton ex rel. Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989) (refusing to find an action unconstitutional "due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action"); *cf. Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) ("[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is . . . inconsistent with our national traditions . . . ." (citations omitted)). In a small community like Haskell County, where everyone knows everyone, and the commissioners were readily identifiable as such, however, we conclude that the reasonable observer would have been left with the clear impression—not counteracted by the individual commissioners or the Board collectively—that the commissioners were

speaking on behalf of the government and the government was endorsing the religious message of the Monument. *See McCreary*, 545 U.S. at 869 ("The reasonable observer could only think that the [government] meant to emphasize and celebrate the Commandments' religious message.").[11]

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[11] We recognize that the district court had a different take on the situation.

> No believable evidence exists that the Commissioners were ever referred to in their official capacities. Furthermore, given the nature of the humble tight-knit community in this rural Oklahoma county described by witnesses at trial, the court is not convinced that a reasonable observer would have viewed these men as speaking or appearing for Haskell County government.

Green, 450 F. Supp. 2d at 1293. However, we simply do not find the court's reasoning to be persuasive. Precisely because Haskell County is "a small, sparsely-populated, rural Oklahoma county," *id.*, no one would need to refer to the commissioners as acting in their official capacity in order for the reasonable observer to conclude that they were doing so. Furthermore, the court's assertion that it was "not convinced" from the witnesses' testimony about Haskell County's characteristics that a reasonable observer would have deemed the commissioners to be acting for the county is not the sort of finding concerning "the basic historical facts upon which the claim is grounded" that is afforded "the usual 'clearly erroneous' standard of review." *Friday*, 525 F.3d at 950; *cf. Green*, 450 F. Supp. 2d at 1284, 1293 (making this specific assertion appearing in portion of opinion entitled "Conclusions of Law"). The question is not whether the commissioners actually were carrying out official functions in connection with their appearances at the Monument and in offering comments about it. *Cf. Green*, 450 F. Supp. 2d at 1276 (finding relative to the unveiling that "neither gentlemen appeared in his official capacity as County Commissioner"); *id.* at 1280 (finding as to the rally that "there is no indication they attended in their official capacity as County Commissioners").

We underscore that the reasonable observer's impression of government endorsement would not be based upon the commissioners' statements alone. The statements would be just part of the history and context of which the reasonable observer would be cognizant. In particular, that observer also would know of the religious motivation—seemingly endorsed by the Board—that led to the installation of the Monument. And the observer would have little information indicating that there was more at play in the Monument's installation, and the Board members' efforts to maintain it in the face of clearly voiced Establishment Clause concerns,[12] than the Board's

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Rather, the question is whether a reasonable observer would have perceived them as being engaged in official activities. And the answer to that question is closely (if not inextricably) intertwined with the legal effect determination. Therefore, insofar as it is a factual finding at all, the court's assertion regarding the reasonable observer's perception is akin to a finding concerning a constitutional fact and subject to de novo review. *See Weinbaum*, 541 F.3d at 1029 (noting that in the First Amendment context we review de novo a district court's findings concerning constitutional facts). Under that standard, we conclude that the district court's assertion is not well-grounded.

[12] There of course is no requirement that governments fold under litigation pressure or explain themselves when confronted with an Establishment Clause challenge. Indeed, we observed as much in *O'Connor*, 416 F.3d at 1227 ("A defendant's failure to change its behavior in accordance with plaintiffs' demands, however, is not in itself proof of anti-religious intent."). However, significantly, the *O'Connor* court took note under *Lemon* of the university's publicly announced secular reasons for continuing to maintain the allegedly anti-Catholic display after Establishment Clause concerns were raised. *Id.* at 1228. In particular, just because a government is not *required* to explain its intent in erecting and retaining a Ten Commandments display, in the face of strongly

desire to facilitate the dissemination of a religious (i.e., in their view, Christian) message. In this light, we would be hard-pressed to conclude that "a reasonable observer, reasonably informed as to the relevant circumstances, would perceive the government to be acting neutrally."[13] *City of Ogden*, 297 F.3d at 1010.

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voiced religious endorsement allegations, does not mean that the reasonable observer is prohibited from considering the government's decision to stand mute, and from drawing inferences from that decision that the law ordinarily permits to be drawn when one does not rebut a serious allegation of wrongdoing, despite understanding it and being well situated to respond—that is, the inference that the government accepts the truth of the allegation. *Cf.* Fed. R. Evid. 801(d)(2)(B) (discussing adoptive admissions: "a statement of which the party has manifested an adoption or belief in its truth"); 5 Joseph M. McLaughlin et al., *Weinstein's Federal Evidence* (2d ed. 2009) (noting that "[a] party can adopt another's statement by responding to it with silence," and that courts must look to the circumstances including whether the party "understand[s] the statement" and is able or "unable . . . to reply to it"); *see also New Eng. Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 650 (10th Cir. 1989) (declining to apply the adoptive admission principle to defendant because, *inter alia*, "New England did not establish that she had ever read the *Times* article [including the alleged statement], or that she was in any position to respond to the article"). That inference would not be determinative by any means, but it would be one factor, among many others, that the reasonable observer could consider in reaching a conclusion on the endorsement issue.

[13] The Board can draw little (if any) support from the fact that Mr. Bush raised the funds for the Monument from private sources and effectively donated it to Haskell County for placement on the courthouse lawn. *See Green*, 450 F. Supp. 2d at 1295-96 (treating the "unexpected dispute" over whether Haskell County actually owns the Monument as essentially waived). The Supreme Court's *Pleasant Grove* decision dispels any doubt—at least under these facts—that, once donated, the Monument manifested government speech as a matter of law. *Pleasant Grove*, 129 S. Ct. at 1132

We recognize that certain evidence weighs against a finding of endorsement. However, surveying the entire record, we cannot conclude that this evidence sufficiently blunts the message of endorsement that we find to be present to alter the result. Perhaps militating most significantly in favor of a conclusion of non-endorsement is the fact that a reasonable observer would have noticed that the Monument was one of numerous other monuments and displays on the courthouse lawn. This fact would typically weigh against a finding of endorsement. *See O'Connor*, 416 F.3d at 1228 ("The reasonable observer . . . would therefore be aware that the statue was one of thirty outdoor sculptures displayed on the Washburn campus, of which several were located within sight of the challenged display."); *City of Ogden*, 297 F.3d at

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(holding that "[p]ermanent monuments displayed on public property typically represent government speech"); *see supra* note 8. Furthermore, even before *Pleasant Grove*, Establishment Clause jurisprudence made clear that, standing alone, the fact that a display is privately donated cannot insulate the government actor from a meaningful constitutional challenge; indeed, Establishment Clause cases not uncommonly have involved donated displays. *See, e.g.*, *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency."); *Card v. City of Everett*, 520 F.3d 1009, 1010 (9th Cir. 2008) (noting in an Establishment Clause case that the monument was "donated to the City of Everett . . . by the local aerie (chapter) of the Fraternal Order of Eagles"); *cf. City of Ogden*, 297 F.3d at 998, 1009 (undertaking Establishment Clause hypothetical analysis when raised as a "defense" in lawsuit involving Ten Commandments monument donated by the Fraternal Order of Eagles).

1011 ("[W]e are persuaded that a reasonable observer would, instead, note the fact that the lawn of the municipal building contains a diverse array of monuments, some from a secular and some from a sectarian perspective."); *see also Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("[T]o determine the message that the text [of the Ten Commandments] here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display."); *O'Connor*, 416 F.3d at 1228 ("[T]he question of whether the government has endorsed a particular religious display depends in large part on the display's particular physical setting."). In this regard, in finding that the Monument was constitutional, the district court opined that the "mélange" on the courthouse lawn represents "what Haskell County citizens consider the noteworthy events and sentiments of their county, their state and their nation." *Green*, 450 F. Supp. 2d at 1295.[14]

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[14] We do not think the reasonable observer would find the Monument's precise location militates in favor of a conclusion of impermissible endorsement. Mr. Green would have us place significance on the fact that the Monument could be viewed from the road. While we have noted in the past that a prominent location can weigh in favor of endorsement, *see O'Connor*, 416 F.3d at 1228 (observing that factors including "the statue's location next to a footpath at a prominent location on campus, in an area reserved for official use" would "weigh toward a finding of state endorsement"), this Monument was placed in line with the other monuments already on the lawn, and the monuments could all be seen together. *See* Appendix Ex. C. Thus, we see no grounds for concluding that a reasonable observer would find that the Board had assigned a place of special prominence to the Monument in an effort to endorse its religious message. *See Green*, 450 F. Supp. 2d at 1294 ("[T]he Monument is not particularly large, and is not in a clearly high traffic area. . . .

However, the Monument is not a part of a unified exhibit in a "typical museum setting" like the statute found in *O'Connor*. *See O'Connor*, 416 F.3d at 1228 (noting that a brochure made clear "that the statue was part of an outdoor art exhibit"). Nor is the courthouse lawn a setting that is typically associated with intellectual experimentation like the university setting of *O'Connor*. *Id.* at 1229-30 (noting that the statue at issue, *Holier Than Thou*, was "displayed in the context of a university campus, a place that is peculiarly the marketplace of ideas" and that "especially" in that context "no reasonable person would associate the message of *Holier Than Thou* with the state" (internal quotation marks omitted)). Furthermore, we do not view the Haskell County courthouse context as bearing a close resemblance to the monument setting in *Van Orden*. 545 U.S. at 702 (Breyer, J., concurring) (describing the monument sitting "in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of those who settled in Texas and of those who lived there since that time").[15] Although ultimately

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Furthermore, the Monument does not appear to be placed in an area that is the most frequented route taken to the courthouse by citizens going there to undertake business."). However, as suggested by the analysis relating to *O'Connor* and *Van Orden* in text *infra*, this point hardly wins the day for the Board.

[15] To be sure, at a high level of generality, the Haskell County courthouse display involving the Monument does bear some similarities to the capitol grounds display in *Van Orden*. However, one might reasonably expect that frequently that will be the case with Ten Commandments monument displays on courthouse lawns, or capitol grounds, or similar governmental venues. Even before *Van Orden*, governments undoubtedly were inclined to display in such places multiple symbols of things that they

finding that the Monument had a secular effect, the district court here acknowledged that "people . . . might see the monument display [of *Van Orden*] in Texas as more cohesive, more integrated, more, well, artistic than the Stigler mélange."[16] *Green*, 450 F.

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presumed the people they served cherished or venerated, including the Ten Commandments. *E.g.*, *City of Ogden*, 297 F.3d at 998 ("Located to the left and to the right of the Monument are, respectively, a police officer memorial and a sister city tree and plaque. Also located on the Municipal Grounds, though somewhat removed from the area containing the above-described monuments, are various historical markers."). After *Van Orden*, governments wishing to display Ten Commandments monuments will be even more motivated to display them with multiple symbols in the hope of gaining some incremental level of protection against Establishment Clause liability.

[16] Lest we generate confusion, this is not a matter of aesthetics. In *Van Orden*, the secular historical and moral messages of the Ten Commandments display were highlighted by the fact that they were part of an assortment of monuments that shared a unifying, cohesive secular theme. *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring). That theme reflected "the historical 'ideals' of Texans" that allegedly were grounded on moral principles involving ethics and the law. *Id.* at 702. Therefore, at least in part due to the cohesive theme, the capitol grounds display in *Van Orden* "communicate[d] to visitors" predominately the message that "the State sought to reflect moral principles, illustrating a relation between ethics and law," *id.*—rather than a message that was predominately religious. The district court here apparently recognized this aspect of *Van Orden*. That led the court to observe that, although there were several monuments on Haskell County's courthouse lawn, there was less of a unifying, cohesive secular theme associated with those monuments than with the *Van Orden* monuments. As a consequence, under the reasoning of *Van Orden*, the Haskell County courthouse display was at least to some appreciable degree less likely than the *Van Orden* display to bring to the fore the secular historical and moral messages of the Ten Commandments. The reasonable observer therefore would be

Supp. 2d at 1288.

Significantly, the sharp contrast between the timing of the legal challenges to the monument in *Van Orden* and the one in this case sheds significant light on whether the reasonable observer would have perceived the latter as having the effect of endorsing religion. *See Weinbaum*, 541 F.3d at 1031 ("If a government symbol has long gone unchallenged, there is a suggestion that an objective observer would not think that the symbol endorses a religious message."). In *Van Orden*, Justice Breyer observed that "40 years passed in which the presence of this monument, legally speaking, went unchallenged." 545 U.S. at 702 (Breyer, J., concurring); *see id.* at 682 (plurality opinion) ("Forty years after the monument's erection and six years after Van Orden began to encounter the monument frequently, he sued numerous state officials in their official capacities . . . seeking both a declaration that the monument's placement violates the Establishment Clause and an injunction requiring its removal.").

Justice Breyer reasoned that those years of tranquility "suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion." *Id.* at 702 (Breyer, J., concurring); *cf.*

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more inclined than in *Van Orden* to view the Ten Commandments as evincing a religious message. Therefore, the point here is not one of aesthetics.

id. at 703 ("This case also differs from *McCreary County*, where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them."). Indeed, Justice Breyer found the passage of forty years without a challenge to the monument to be "determinative."[17] *Id.* at 702; *cf. Pleasant Grove*, 129 S. Ct. at 1140 (Scalia, J., concurring) (noting that "[t]he city can safely exhale" and its residents can enjoy a public park containing a Ten Commandments monument "without fear that they are complicit in an establishment of religion," because, *inter alia*, the monument "was erected in 1971" and that "means it is approaching its (momentous!) 40th anniversary" without an Establishment Clause challenge).

Here, the difference is striking. In less than one year after the Monument was unveiled, Mr. Green challenged the erection of the Monument as an Establishment Clause violation, filing the federal lawsuit underlying this appeal. Accordingly, despite its presence on the courthouse lawn with other displays

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[17] Given that *Van Orden* was decided by a plurality, the separate opinion of Justice Breyer, who supplied the "decisive fifth vote," *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1198 (10th Cir. 2003), is controlling under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)). *See* Clement, *Public Displays*, *supra*, at 241 ("Because no opinion [in *Van Orden*] commanded a majority, Justice Breyer's concurring opinion is the law of the case.").

and monuments, this rather prompt litigation response to the Monument makes it difficult for us to glean "a suggestion that an objective observer would not think that the symbol endorses a religious message." *Weinbaum*, 541 F.3d at 1031. Accordingly, viewing the record as a whole, we do not believe that the Monument's setting here should lead us to a different conclusion on the endorsement question.

Likewise, we cannot conclude that the Monument's text that is unrelated to the Ten Commandments would persuade a reasonable observer that the principal or primary effect was not to endorse religion. The reasonable observer would have been aware that the Monument not only contained the Ten Commandments, but also the Mayflower Compact. The fact that the Ten Commandments are not displayed in isolation is not without significance. *See, e.g.*, *McCreary*, 545 U.S. at 869 ("The point is simply that the original text [of the Ten Commandments] viewed in its entirety is an unmistakably religious statement dealing with religious obligations and with morality subject to religious sanction. When the government initiates an effort to place this statement *alone* in public view, a religious object is unmistakable." (emphasis added)). But, at least on these facts, the import of its pairing with the Mayflower Compact is equivocal at best.

The Mayflower Compact has an independent historical significance and also demonstrates the relevance of religion to that history. *See, e.g.*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is

clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."); *see also Van Orden*, 545 U.S. at 683 (quoting same); *Edwards v. Aguillard*, 482 U.S. 578, 606 (1987) (Powell, J., concurring) (quoting same). However, we cannot construe a display of the Ten Commandments not to be an endorsement of religion merely because it is accompanied by the Mayflower Compact or other secular documents. *See McCreary*, 545 U.S. at 854, 856 (noting that the Mayflower Compact was included in the second and third versions of the display containing the Ten Commandments that was ultimately struck down). Its inclusion arguably could be viewed as merely part of an "unstinting focus . . . on religious passages" that merely furthers the endorsement. *Id.* at 870. The evidence thus cuts in both directions, and because no effort was made by the Board to help the reader interpret the intended relationship between the two documents, the reasonable observer would not find the Mayflower Compact helpful in determining whether the Monument endorses religion.[18]

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[18] Furthermore, we also note that the reasonable observer would have been aware that the Mayflower Compact was added by Mr. Bush *after* the Board authorized the Monument project and the Board apparently did not subsequently formally agree to its placement on the Monument. This fact may bear more on the purpose inquiry. *Cf. O'Connor*, 416 F.3d at 1226 ("Nor does the evidence show that the statue's caption was selected with anti-Catholic intent. The record establishes that the caption had not yet been placed on the statue at the time it was selected by the Campus Beautification Committee and approved by President Farley."). However, the Monument's context and history certainly also are relevant to the effect inquiry. *See, e.g.*, *Weinbaum*, 541 F.3d at 1031 (noting that the effect prong "looks through the eyes of an objective observer who is aware of the purpose, *context*, *and history* of the symbol" (emphasis added)); *cf. O'Connor*, 416 F.3d

Similarly, we do not believe that the reasonable observer would be less inclined to find an impermissible endorsement of religion because of the Monument's notation "Erected by Citizens of Haskell County." We recently suggested in other cases that a city could post a disclaimer "explaining clearly that private entities are responsible for at least some of the [monuments on municipal grounds], including the Ten Commandments Monument and the Seven Principles Monument." *City of Ogden*, 297 F.3d at 1011; *see Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring) ("The tablets, as displayed on the monument [bearing the Ten Commandments], prominently acknowledge that the Eagles [a private civic, and primarily secular, group] donated the display, a factor which, though not sufficient, thereby further distances the State itself from the religious aspect of the Commandments' message."). However, the addition of such a disclaimer would not be "sufficient," alone, *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring), and could not tip the balance on these facts, given the very significant magnitude of the evidence indicating an impermissible

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at 1225 n.2 ("In this case, the context and content of the statue is relevant to the effect of the display in addition to the university's purpose.") Therefore, the reasonable observer assessing the Monument's effect would have been aware that at the time the Board authorized its erection, as far as the Board knew, the Monument would consist only of the Ten Commandments. *Cf. Weinbaum*, 541 F.3d at 1033 ("Effects are most often the manifestations of a motivating purpose."). Consequently, even if the independent historical significance of the Mayflower Compact ordinarily would militate in favor of a finding of non-endorsement in the reasonable observer's eyes, the reasonable observer probably would have been less likely to give it that effect here.

endorsement.[19] Furthermore, any incremental movement toward the side of non-endorsement resulting from the addition of the notation would be hobbled by the reasonable observer's awareness that the addition took place *after* litigation had begun and on the eve of trial. Litigation positions do not alter reasonable memories. *Cf. McCreary*, 545 U.S. at 871-72 (noting that the counties' "new statements of purpose were presented only as a litigating position" and that "[n]o reasonable observer could swallow the claim that the Counties had cast off the [religious] objective so unmistakable in earlier displays").

We conclude by underscoring the proposition that "[c]ontext carries much weight in the Establishment Clause calculus." *Weinbaum*, 541 F.3d at 1033. In the context of the small community of Haskell County, we hold that the Board's actions in authorizing and maintaining the Monument—inscribed with the Ten Commandments—on the courthouse lawn had the impermissible principal or primary effect of endorsing religion in violation of the Establishment Clause.

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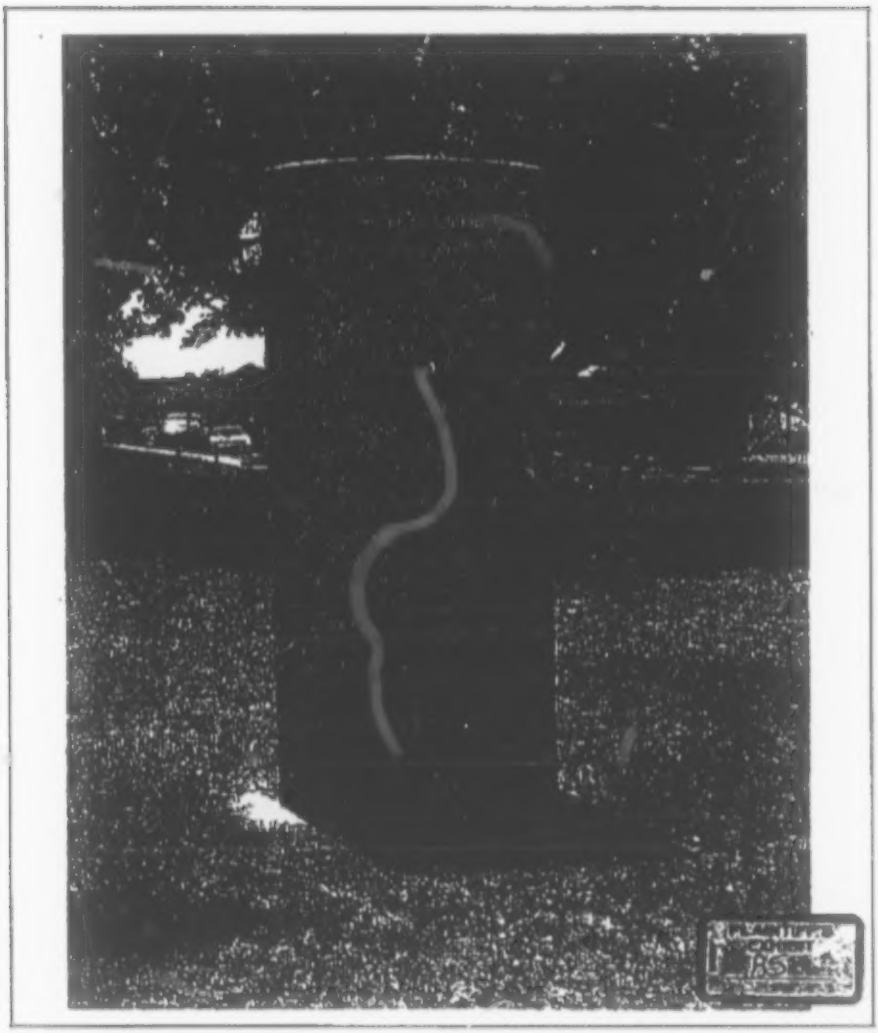
[19] Indeed, we had no occasion in *City of Ogden* to assess the likely impact of such a disclaimer because it would merely have aided there in confirming what already was clearly not an Establishment Clause violation. *See City of Ogden*, 297 F.3d at 1011 (rejecting the argument that, hypothetically, the city's acceptance of a display with a religious theme would have the effect of endorsing religion, but noting "[t]o the extent to which the City of Ogden remains genuinely concerned regarding the likely *misapprehensions* of passersby, the City might also post a disclaimer" (emphasis added)).

III. CONCLUSION

The district court's order is **REVERSED**. We **REMAND** for the district court to enter judgment consistent with this opinion.

Appendix A



Plaintiffs' Exhibit 85 (size reduced to fit page).

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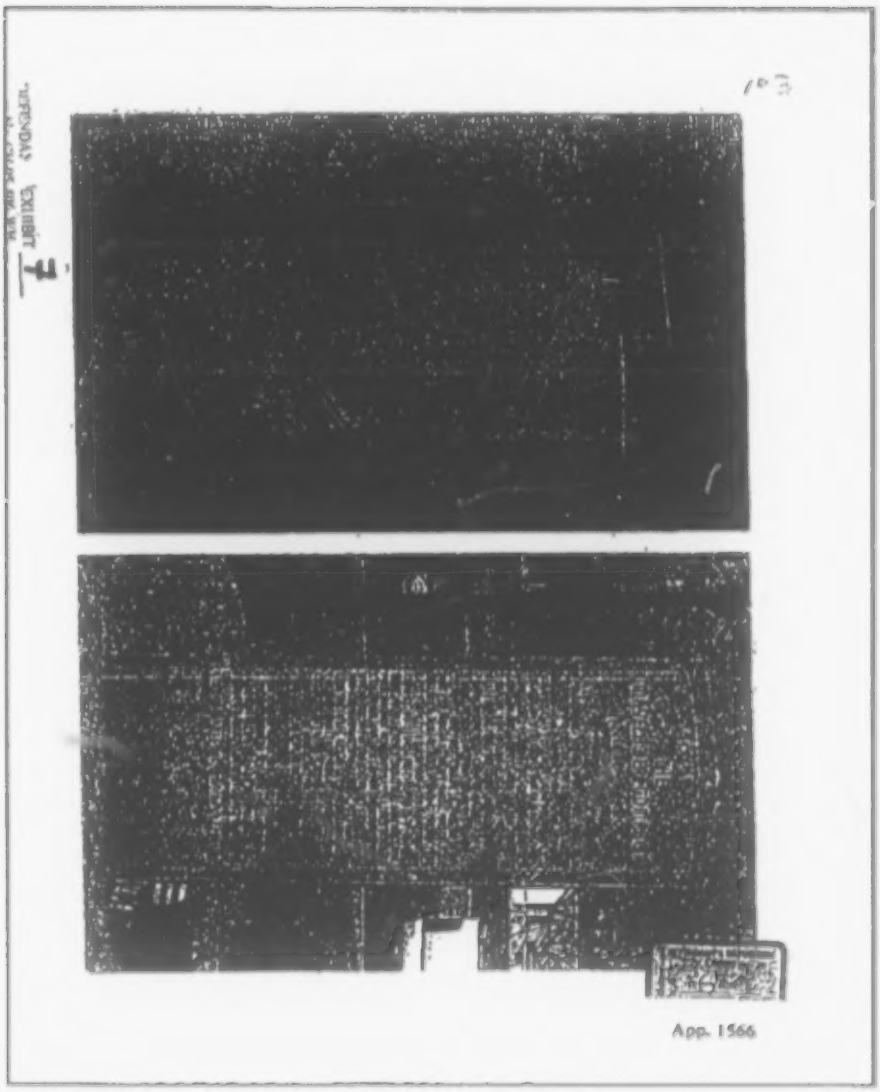
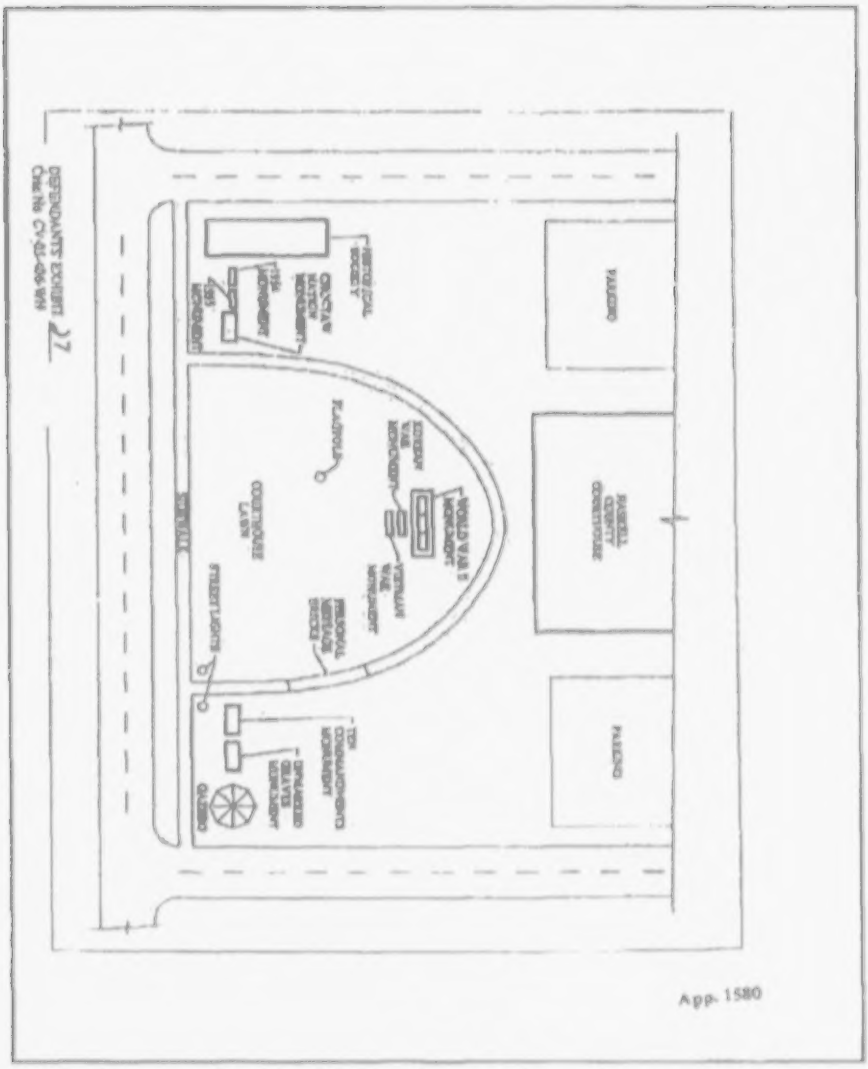
Appendix B



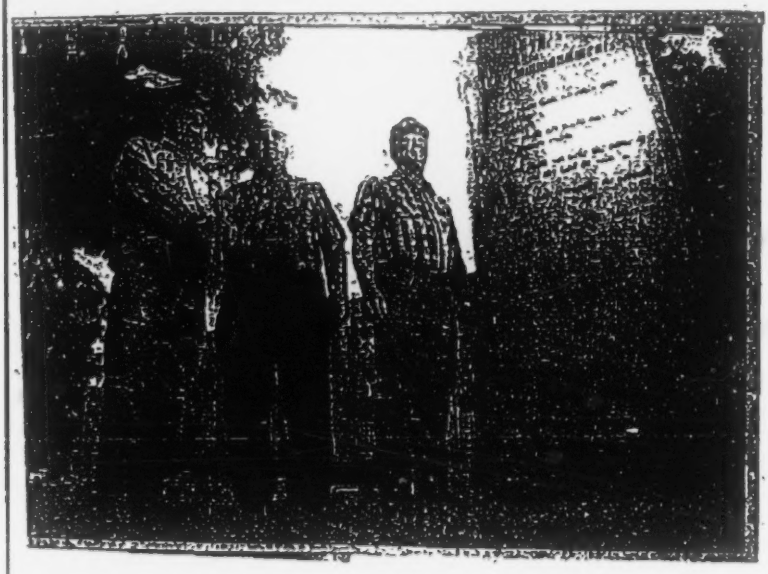
Defendants' Exhibit 7 (Deposition Exhibit 6)
(size reduced to fit page).

Appendix C



Defendants' Exhibit 27 (size reduced to fit page).

Appendix D



Plaintiffs' Exhibit 1 (size reduced to fit page).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 06-7098

[Filed June 8, 2009]

JAMES W. GREEN, an individual; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA, a non-profit corporation,	)
Plaintiffs - Appellants,	)
v.	)
HASKELL COUNTY BOARD OF COMMISSIONERS, also known as Board of County Commissioners of Haskell County, Oklahoma; KENNY SHORT, in his official capacity as Chairman of the Haskell County Board of Commissioners,	)
Defendants - Appellees,	)
---	)
MAINSTREAM BAPTIST NETWORK; OKLAHOMA MAINSTREAM BAPTISTS; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CENTER FOR LAW AND JUSTICE; THE NATIONAL LEGAL FOUNDATION; AMERICAN LEGION # 182;	)

FOUNDATION FOR MORAL LAW,)
)
Amici Curiae.)
)

JUDGMENT

Before **HARTZ, O'BRIEN,** and **HOLMES,** Circuit Judges.

This case originated in the Eastern District of Oklahoma and was argued bycounsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 05-CIV-406-RAW

[Filed August 18, 2006]

JAMES W. GREEN, and AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA,	)
Plaintiffs,	)
v.	)
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF HASKELL, and HENRY FEW,	)
Defendants.	)

OPINION AND ORDER

The present kerfuffle ensued when Plaintiff James W. Green took offense at the erection of a Ten Commandments Monument on the lawn of the Haskell County courthouse. Along with the American Civil Liberties Union of Oklahoma ("ACLU-Oklahoma"),

Green commenced these proceedings seeking, among other things, removal of the Monument. Trial of the issues was held on May 1-2, 2006.

CANTICA I. FINDINGS OF FACT

Canto A. Here Is Set Forth The Story Of The Monument's Erection And The Subsequent Although Not Necessarily Consequent Events.

Located in Southeastern Oklahoma, Haskell County has a population of about 15,000 people. The seat of county government is in Stigler, which is home to approximately 2,500 souls. Everyone knows each other.

Highway 9 is one of the major state highways in Haskell County. It becomes Main Street as it runs through Stigler and passes directly in front of the Haskell County courthouse. It is the busiest street in Stigler.

The courthouse sits in the middle of approximately one square block of county property. Parking lots exist on both sides and in back of the courthouse. No parking exists at the front of the property except a few parallel parking spaces on Highway 9 itself. Most people who come to the courthouse to conduct business park in the side or rear parking lots.

The setting of the courthouse grounds is somewhat bucolic. Squirrels run across the grass, tall trees shade the lawn and neat sidewalks criss-cross it to converge at the front and side entrances. A small, rustic log cabin housing the Haskell County Historical Society is

on the northeast side of the property. A picturesque gazebo, suitable for anything from political rallies to orchestral performances, stands on the northwest corner. Indeed, a number of public and private events take place on the courthouse lawn and at the gazebo.

The courthouse itself is not, from all appearances, an architectural marvel. To the court's untrained eye, its style could be described as "muscular brick and concrete with turquoise trim." A cheerful looking building it is not; however, no question has been raised regarding its functionality.

Spread willy-nilly over the front lawn of the courthouse is a mélange of marble[1] monuments of various styles, sentiments and construction. Private citizens paid for and erected most of the monuments. The largest monument sits smack dab in the center of the lawn. It lists and honors Haskell County citizens who died in World Wars I and II. In front of it are smaller monuments for KIAs in Vietnam and Korea. Behind the war memorial is a small rose garden with a birdbath. Nearby, straight and tall, stands a flagpole from which Old Glory proudly waves.

A large marble monument honoring the Choctaw Nation also stands on the front lawn. No other Indian tribe is represented by a monument on the courthouse lawn in Haskell County. Near the gazebo, a large marble monolith honoring all unmarked graves in

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[1] Admittedly, the court is ignorant geologically and has no clear knowledge of whether the hard impermeable substances constituting the monuments are marble, granite, limestone or something else. They look marble; therefore, that is what the court will call them. Also, like "mélange," it alliterates better.

Haskell County looks out majestically over Main Street.

Not last, and certainly not least, the courthouse lawn holds two sturdy marble benches dedicated to and inscribed respectively by the Class of 1954 and the Class of 1955. The names of members of the graduating class are inscribed in (mostly) alphabetical order on the tops of the benches. The court is unsure why no other class demonstrated the wherewithal or initiative to erect a monument to themselves, or why the County perhaps approves of no other high school graduating class.

One of the sidewalks contains a section of "personal message bricks." Each brick expresses a dedication to a loved one or sponsor such as "Earl & Effie Cantrell" or "Oklahoma Natural Gas Company." The personal message bricks could be considered individual "monuments." On the two northern corners of the lawn are two small (approximately 3' x 5') white billboard advertisements with red lettering. The sign on the northeast corner points the way to "First Assembly of God, Stigler." The sign on the northwest corner points the way to "Bread of Life Ministry of Jesus."

Of course, the courthouse lawn is also the site of the Ten Commandments Monument.[2] But more on that anon.

Like the architecture of the courthouse itself, the lawn monuments have no apparent central theme to the amateur eye. One could argue that they all have

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[2] Hereinafter "the Monument" or "the Stigler Monolith."

some tenuous connection to the history of Haskell County. Of course, the flagpole and displayed American flag are also a "monument." Such a monument has no real connection to Haskell County history, except for the fact that Haskell County, since its inception, has been part of the Union. Those Haskell County men honored by the war memorials certainly died for that Union. In any event, the only apparent County policy regarding the placement of monuments on the lawn that existed prior to this lawsuit was in the nature of unwritten folklore. That policy ostensibly stated: "It must be in good taste, nothing vulgar, and can't cause a riot."[3]

Sometime in the 1990s,[4] Plaintiff James Green asked the County Commission for permission to erect a rose arbor monument honoring all Stigler high school graduates. At the time he made this request, the lawn contained only a few monuments. He was denied permission by the presiding commission,[5] allegedly being told, "We do not want to clutter up the courthouse lawn." The subsequent addition of the monuments previously described might call into question whether that goal has been met. Still, reasonable minds could differ. One might think that the addition of a cannon would be inspiring. Others

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[3] During this litigation, the County adopted a detailed, legalistic policy to govern future monument erections. That policy, and its adoption, play no part in the outcome of this case.

[4] Plaintiff Green was inconsistent over the course of this litigation in remembering the exact year.

[5] The Commissioners who denied Green's request were different from the ones approving the erection of the Monument.

may think that perhaps a shrubbery would be nice. Luckily, such aesthetic issues are not properly the province of the federal judiciary, but instead rest with officials answerable to the electorate.

The lucky officials answerable to the Haskell County electorate are members of the Board of County Commissioners. The Board operates and controls county property. Consequently, the Board also has the heavy burden of deciding what decorative items or monuments, if any, are placed on the courthouse lawn. The Commissioners during the relevant time period in this case were Henry Few, Kenny Short, and Sam Cole. Mr. Cole unfortunately died after this lawsuit was filed and only seventeen days after his deposition was taken. There is no known connection.

Mike Bush is a lifelong citizen of Stigler and a part-time substitute minister for various churches in the area. One day while having lunch with a friend, he felt as if "the Lord laid a burden on [his] heart." This burden involved erecting a Ten Commandments Monument on the courthouse lawn. On September 27, 2004, Bush was on the Board's agenda for its 10:30 a.m. meeting to discuss the Monument. Bush told the Board about the Lord placing a burden on his heart to erect the Monument, and advised the Commissioners he would take care of all the expenses for the project. Bush apparently had no drawings or plans for the Monument.

The minutes of the meeting state: "The Board met with Mike Bush to discuss getting a monument with the Ten Commandments on it to put on the courthouse lawn. The Board agreed Mike could go ahead and have the monument made and Mike is taking care of all the

expenses." Other than Bush, no one else at the meeting discussed religion with regard to the decision to allow the Monument's erection. The Board discussed the historical aspects of the project. Erecting the Monument was solely the idea of Bush and not of any of the Commissioners. Bush proceeded to raise the funds to create the Monument with the help of local religious leaders and church groups, all of the Christian faith.

The Monument was planted firmly in the courthouse lawn on November 5, 2004, but was covered with a tarp until the unveiling ceremony that occurred two days later. The ceremony was not sponsored by the Commissioners or the County. Indeed, it was not even their idea. While it was open to the public, the unveiling ceremony was organized by Bush. Invitations were by word of mouth because everyone knows each other.

Lasting about an hour, the dedication ceremony was highly informal, impromptu and mostly religious in nature. Approximately one to two hundred people may have been present that Sunday afternoon and about seventeen churches were represented. Cole and Few attended the ceremony, while Short did not. Bush remembers Cole and Few saying a few words; however, Few denies speaking at the ceremony and does not remember if Cole spoke. Cole denies speaking. Apparently, neither gentlemen appeared in his official capacity as County Commissioner. No record exists of any words spoken by Cole or Few.

The Monument itself is eight feet tall and three feet wide. A subdued grey color, the Monument is inscribed in black letters with the Ten Commandments on the

side facing Highway 9 and the Mayflower Compact on the side facing the courthouse.[6] The Ten Commandments are phrased on the Monument as follows:

The Ten Commandments

I Thou shalt have no other gods before me.
II Thou shalt not make unto thee any graven image.
III Thou shalt not take the name of the Lord thy God in vain.
IV Thou shalt remember the sabbath day and keep it holy.
V Thou shalt honor thy father and mother.
VI Thou shalt not kill.
VII Thou shalt not commit adultry [sic].
VIII Thou shalt not steal.
IX Thou shalt not bear false witness against thy neighbor.
X Thou shalt not covet thy neighbor's house.

Exodus 20

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[6] Testimony by Commissioner Short established the sizes of most of the monuments and their relative distance from each other. The Monument is larger than some on the lawn and smaller than some others. The court did not believe the distance between the monuments to be particularly material. Nevertheless, a not-to-scale diagram showing the approximate location of the monuments on the lawn was helpful and was admitted as Defendants' Exhibit 27.

Erected by Citizens of Haskell County

This phrasing has been described by all parties to this litigation as the "King James Version" ("KJV") of the Ten Commandments. That description is not grossly inaccurate, but is something of a stretch. The actual KJV of the Commandments, Exodus 20:1-17, is considerably lengthier, more complex, detailed and poetic:

> And God spake all these words, saying,
>
> I am the Lord thy God, which have brought thee out of the land of Egypt, out of the house of bondage.
>
> Thou shalt have no other gods before me.
>
> Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:
>
> Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me;
>
> And shewing mercy unto thousands of them that love me, and keep my commandments.
>
> Thou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain.

Remember the sabbath day, to keep it holy.

Six days shalt thou labour, and do all thy work:

But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates:

For in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the sabbath day, and hallowed it.

Honour thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbour.

Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's.

Exodus 20:1-17 (KJV).[7] The Monument's text could best be described as a butchered paraphrase of the KJV. The only real similarities between them are the numerical order of the Commandments and the prodigious use of the idiom "shalt."

The text of the Mayflower Compact on the Monument states:

The Mayflower Compact
November 11, 1620

In the name of God, Amen.

We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James, by the grace of God, of Great Britain, France and Ireland king, defender of the faith, ect. [sic], having undertaken, for the glory of God, and advancement of the Christian faith, and honor of our king and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents solemnly and mutually in the presence of God, and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices,

---

[7] Neither party offered into evidence the actual text of the KJV of Exodus 20:1-17. The court feels justified in and obligated to take judicial notice of it pursuant to Rule 201, Fed.R.Evid. Also, a "restatement" of the Commandments appears at Deuteronomy 5:6-21.

> from time to time, as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.
>
> In witness whereof we have hereunder subscribed our names at Cape-Cod the 11 of November, in the year of the reign of our sovereign lord, King James, of England, France, and Ireland the eighteenth, and of Scotland the fifty-fourth. Anno Domine 1620.

The court is unsure if the misspelling of the abbreviation for "et cetera" was a scrivener's error of the original Pilgrims or Bush.[8]

The Board never approved, or even reviewed, Bush's design of the Monument or the version of the Commandments that appears on it. Indeed, like Justice Scalia and this court,[9] none of the Commissioners knew that different versions of the Ten Commandments might exist at the time they voted to approve the Monument.

Bush himself admits that the addition of the Mayflower Compact was an afterthought of his own,

---

[8] The court does not intend to sound condescending. Typographical errors are certainly not an indication of lack of intelligence. The court is sure of this because the court is also sure that this Opinion and Order will contain typographical errors, which will undoubtedly be gleefully and justifiably mocked by grammarphiles in our midst.

[9] See McCreary County v. ACLU, 125 S.Ct. 2722, 2762, n. 12 (Scalia, J., dissenting) (2005).

and he intended to add it to help in defending the Monument against legal challenge. The Board also never officially reviewed or approved the addition of the Mayflower Compact to the Monument. At some time during the five weeks before trial, Bush also added the following text to the Monument: "Erected by the Citizens of Haskell County." Again, the Board did not apparently approve or even know about the addition of this language to the Monument. Monument inscribing in Haskell County appears not only to be decriminalized, but wholly unregulated.

After the unveiling of the Monument, the Commissioners were asked by members of the media to pose for pictures beside it. One photograph is taken from a very low angle and depicts the Monument and the Commissioners themselves towering over the viewer. The Commissioners never asked to be photographed beside the Monument. They simply posed as directed by the photographers.

After the unveiling of the Monument, and the initial media coverage of it, nothing happened. The Monument was not the site of protests, religious services, or witch burnings. It was not mentioned in any minutes of meetings of the Board. From all appearances, the Monument received no more attention than any of the other marble edifices on the courthouse lawn. Basically, nothing happened.

Well, not nothing entirely. Plaintiff James Green became offended by the Monument. Green has lived in Stigler for the last ten years. He visits the Haskell County courthouse frequently for a variety of purposes. Green claims he cannot avoid the Monument when he is conducting his business at the courthouse because of

its formidable appearance and its prominent placement on the lawn. Green is offended by the Monument because he believes its text is presented as a mandate and is thus an endorsement by the government of religious matters. He objects to the text of the Ten Commandments etched into the Monument because he subscribes to the later teachings of Jesus. He objects to the Ten Commandments because of their "terroristic origins."[10] Green also believes that his opposition to the Monument has caused Commissioner Sam Cole to destroy or ignore Green's open records request, his request for hearing impairment assistance and his petition regarding the location of the new county jail.

Like Green, Sharon Nichols is a resident of Stigler. Like Green, she owns real property and pays taxes to Haskell County. Like Green, she is offended by the Monument on the courthouse lawn. Nichols is a member of the ACLU-Oklahoma chapter. She believes the Monument is exclusionary and discriminatory because it is an explicitly religious text from a particular religious group, and gives the impression that the county supports and endorses the message of the Monument. Nichols goes to the courthouse for various reasons. She finds the Monument to be very prominent and thus unavoidable. Revealingly, despite the fact both Nichols and Green both vociferously reiterated the formidable and unavoidable nature of the Monument, neither individual noticed at the time of trial that Bush had recently added language to the

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[10] The KJV states explicitly that God will visit the iniquities of the fathers upon the sons. (Exodus 20:5) Of course, no such language is actually included in the text of the Monument itself.

Monument stating that it was erected by the citizens of Haskell County.

Thus, other than those things, not much happened after the Monument was erected. Not much, except of course, for the Plaintiffs' filing of this suit on October 6, 2005. Predictably, more things happened then.

For example, Bush circulated a petition. The petition stated, "We the undersigned, do hereby agree with and affirm the following petition: We support the decision of the County Commissioners to allow the erection of the Ten Commandments in front of the Haskell County courthouse, and will continue to support them in the upcoming legal battle." The petition includes seventy-four pages, about sixty-nine of which include signatures of Haskell County residents. No religious invocations or idioms were contained in the petition. Likewise, the County Commissioners did not draft or circulate the petition. It was not their idea.

The Commissioners also did not have the idea to stage a Rally in support of the Monument after the filing of this lawsuit. The Rally was also Bush's idea. He organized it on his own and publicized it with flyers posted all over town, including one on the courthouse door. Part of the poster shows a picture with a young girl standing before an American flag with her hands folded in prayer. The photograph is captioned "One Nation Under God," a phrase from the Pledge of Allegiance. The flyer contains no other arguably religious invocations. No one knows what county official, if any, ever approved the posting of the flyer on the courthouse door. News of the Rally also was mostly spread by word-of-mouth because, after all,

everyone knows each other. Bush organized the Rally in response to the lawsuit. He intended the Rally to encourage the county to stand by its decision to allow the Monument to be displayed.

Approximately three to four hundred people attended the Saturday afternoon Rally. Henry Few and Sam Cole both attended, although there is no indication they attended in their official capacity as County Commissioners. Henry Few apparently said a few words at the Rally. No recording exists of his statement, but he was reported to have said something like: "I am going to stand in front of it and they are going to have to have a bulldozer to roll over me to remove the Monument." Several other people spoke at the Rally including Bush. Most of the speakers were local Christian ministers. Their words were both political and religious in nature. United States Senator Tom Coburn also attended and spoke a few words.

The Monument did not begat the Rally. This lawsuit begat the Rally.

Canto B. Here Is Set Forth A Discussion Of The Witnesses, The Evidence And Other Matters, Some Procedural In Nature.

The story of the Monument's erection unfolded at trial, through the testimony of James Green, Mike Bush, Henry Few, Gail Brown, Kenny Short, William Bruce Prescott, and Sharon Nichols. The court admitted Plaintiffs' Exhibits Nos. 1, 2, 3, 7, 14, 24, 25,

28, 31, 35, 38-50, 53, 54, and 85[11] and Defendants' Exhibits Nos. 2-9, 11-17, 23 and 27. The court also received the deposition of deceased County Commissioner Sam Cole, much of whose testimony was objected to by the Defendants.[12]

The court also conducted a view of the courthouse lawn to better assess the Monument's milieu. The parties consented to the view being undertaken in the absence of counsel "so long as the court does not talk to anybody."[13] The court did not talk to anybody. In

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[11] Plaintiffs' Exhibit No. 85 was admitted upon the court's granting Plaintiffs' Motion to Allow Evidentiary Record Reopened for Limited Purpose of Admission of Photograph Reflecting Present Appearance of Monument Based on Court's Announcement of View [Docket No. 95].

[12] The court has ruled on those objections in a separate order [Docket No. 98].

[13] This exchange occurred at an off-the-record telephone status conference on August 1, 2006. No counsel expressed any concern about a view, except that the court not converse with anyone during it. Counsel promised to draft a stipulation to that effect. A Joint Stipulation was filed [Docket No. 96]; however, it is so filled with caveats and conditions as to make the court believe that at least one of the parties engaged in extensive second-guessing and suffered serious buyer's remorse after the telephone conference. It would be humorous if it was not so divergent from what was actually stipulated to during the conference. Nonetheless, the court is more than happy to comply with counsels' exacting albeit evolving requirements included in the Joint Stipulation: the initial view occurred on February 3, 2006 at approximately 2:00 p.m. The circumstances of the view were as follows: the court drove its pickup truck forty-five minutes to Stigler, looked at the Monument, and returned to Muskogee. The purpose was to look at the Monument. The view lasted about ten minutes. It was a fun road trip, but no recordings, either audio, video or digital, were

addition to the evidence adduced at trial, the court's findings are based in part upon its observations during the view.

In listening to the evidence, the court was faced with many witnesses who had an agenda. The Commissioners' apparent agenda was to please the electorate. Mr. Green and Ms. Nichols' obvious agenda was to remove the Monument. Mr. Prescott's agenda appeared to be furthering the goals of his organizations, Mainstream Baptist and People United for the Separation of Church and State.

People with agendas often become advocates rather than dispassionate witnesses. Consequently, their appearance while testifying was key to the court's determination of their ultimate credibility. For this reason, Sam Cole's deposition testimony is problematic. Deposition testimony is, of course, perfectly acceptable for use at trial. Nevertheless, the inability of the court to perceive Cole's demeanor while testifying like other witnesses gives the court pause in placing too much reliance upon it.

Even so, Cole's deposition testimony revealed that he was obviously not enamored of Plaintiff James Green. This lack of admiration seems to arise from Cole's perception that Green is merely a courthouse

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made of the occasion. The second view occurred August 9, 2006 at approximately 11:30 a.m. The view lasted thirty minutes. The purpose of traveling to Stigler on this occasion was to observe the totality of the courthouse lawn and check the Monument for additional scrivener's errors. The court looked at all the monuments and observed foot and vehicle traffic flow around the courthouse. No recordings were made of the view.

gadfly – an "aginner" who does not like anything. Cole's dislike of Green appears to have predated the erection of the Monument and seems to arise from the dispute over the location of the county jail. In any event, Plaintiff Green did not prove a sufficient connection between Cole's alleged negative behavior toward him and Green's opposition to the Monument.

Because of the witnesses' agendas, the court's observations of their demeanor was key to determining many of the facts. For example, it was readily apparent that the Commissioners personally approve of the message of the Ten Commandments and personally believe the text of the Commandments, whether the KJV or not, is sacred. Conversely, the court also readily perceived that the Commissioners view the Commandments and the Compact as historically significant. Both Few and Short articulated the view that the Monument reflects America's legal tradition and religious heritage by reminding the public of "what we came here for," i.e., to escape governmental religious persecution.

To be sure, Plaintiffs' counsel impeached Few and Short with their prior deposition testimony on occasion. These episodes typically involved details, however, whose importance a reasonable mind could question, such as whether Bush actually possessed drawings of the Monument at the Commissioners' meeting, and other "who said what when" issues. Additionally, Commissioner Few's answers were sometimes not responsive to the question. The court saw that Few was not being intentionally evasive, but rather was simply not listening to the question. After a few suggestions from the court for him to listen more carefully, this problem subsided. In short, the court

perceived Few and Short to be highly credible witnesses. Their down-to-earth demeanor betrayed no dissembling, artifice or deception.

James Green was a credible witness for the most part. While relatively calm, he was also occasionally evasive on cross examination. Green likewise was occasionally impeached by defense counsel with prior deposition testimony. These episodes of impeachment were a bit troubling, as they appeared to reveal that Green's core principles were somewhat flexible. For example, he was inconsistent in his testimony regarding whether he was more offended by the Monument itself or by the Commissioners' alleged statements about the Monument. Additionally, Green was inconsistent in his testimony about whether he objects to the Mayflower Compact. To his credit, he does admit to the historical significance of the Commandments and the Compact. He disputes, however, their specific historical significance to Haskell County.

In contrast to Mr. Green's calm demeanor, Ms. Nichols was not just an advocate witness, she was a vehement one. She seemed intent on ensuring that her self-righteous indignation was on full exhibition at trial. Consequently, the court is adequately convinced of the high level of offense Ms. Nichols experienced because of the Monument. The court is not convinced, however, of her pointed complaint about Commissioner Cole.

Nichols claimed that she called Cole to register her protest of the Monument "in the strongest possible terms." The court has undeniable faith that she did so. Commissioner Cole allegedly questioned Nichols'

religious credentials, stating, "I do not speak to people who aren't Christians," and hung up on her. Unfortunately, Nichols' lack of dispassionate testimony negatively affects her credibility with regard to this allegation. The court is skeptical about the allegations for another reason as well.

Defendants objected to the introduction of this testimony from Nichols. Defendants correctly claim that nowhere in Plaintiffs' Complaint, Initial Disclosures, or Witness List did Plaintiffs give any inkling that Nichols would provide such inflammatory testimony. Additionally, Plaintiffs never supplemented their Disclosures or Witness List regarding this allegation. Most strangely, Plaintiffs' counsel *did not inquire about the allegation* during Cole's deposition on February 28, 2006. Cole's deposition was taken under special conditions because of his poor health. Cole subsequently died on March 17, 2006 and the discovery deadline occurred on March 20, 2006. Nichols' allegations against Cole were first revealed in her deposition on March 2, 2006. Because of Cole's death soon after his deposition, and because no one inquired regarding the allegations at Cole's deposition, Nichols' allegations regarding Cole were effectively unrebutted at trial.

The mere fact that they are unrebutted, however, does not necessarily make them believable. Of course, the court has not made any finding that Plaintiffs' counsel did anything per se improper in failing to reveal these allegations at a time earlier than Nichols'

deposition.[14] That is why the court overruled Defendants' objections to Nichols' testimony and the evidence was admitted. In such circumstances, however, the court might be remiss if it did not give some weight to the litigation tactics delaying the ultimate revelation of the allegations in addition to the demeanor of the witness who delivers them. The court believes Nichols' allegations against Cole are likely apocryphal.

James Prescott, as leader of the Oklahoma Chapter of Americans United for Separation of Church and State, traveled to Stigler apparently to investigate the Rally for purposes of testifying about it at trial.[15] Considering his purpose, his testimony was highly ambiguous, especially regarding Few's comments at the Rally. The only specific comment he remembers Few making is the "bulldozer" quip. Otherwise, his description of what Few said is hardly concrete and he appeared quite cloudy about his recollection. Consequently, the court feels hesitant in giving that testimony much weight.

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[14] The failure of Plaintiffs' counsel to timely supplement their Initial Disclosures and Witness List is somewhat troubling. Ironically, Plaintiffs' counsel were aghast at trial that Defendants had not informed them that Bush had (again) engaged in unauthorized inscribing on the Monument.

[15] Plaintiffs also proffered Prescott as an expert witness. The court excluded that testimony, however, because his report was such a surfeit of partisan advocacy that the scholarship contained in it was significantly undermined. Therefore, the court found that his expert testimony would be unhelpful.

Plaintiffs make much of Few's testimony that he "does not believe in the separation of church and state." Nevertheless, he explained the statement in his own inimitable style. Few simply believes the doctrine of separation has been unnecessarily changed by judicial decisions over the years to be far more restrictive than needed or intended. Reasonable minds certainly differ as to the validity of that conclusion, but it is hardly outside the mainstream of contemporary legal, philosophical or political opinion.[16]

The court is somewhat surprised that Plaintiffs mostly avoided addressing the significance of the addition of the Mayflower Compact to the Monument. Perhaps by such avoidance Plaintiffs were telling the court that the Mayflower Compact has no real factual significance. If so, the court respectfully disagrees.

Green and Nichols conceded the historical nature of the Commandments and the Compact, but assert that those texts lack a specific connection to Haskell County. From their testimony and their demeanor, the court perceived that their real objection is that these historically significant texts are also religious in nature. Even if the Plaintiffs' stated objection regarding the lack of historical nexus to Haskell County is sincere, the Commissioners' belief in the texts' historical significance is sincere as well.

Although having an undeniably religious tone, the Compact focuses on the people combining themselves

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[16] Some historical support for Few's position is presented in P. Hamburger, Separation of Church and State (Harvard University Press, 2002).

into a "civil body politic." Those same people promised "due submission and obedience" to laws enacted by that body. Thus, despite containing some religious wording, the Compact is obviously a legal and political document. Its placement at the courthouse, Haskell County's legal and political center, is hardly incongruous. In response to the Plaintiffs' query, "What's it got to do with Haskell County," both Few and Short indicated that they consider the historical evolution of America's laws and traditions highly relevant to Haskell County, at which courthouse those laws and traditions are today administered and interpreted.

Few, Short and Cole testified that they were aware that Bush's request to erect the Monument implicated his free speech rights. They were also aware that the County had previously allowed other private citizens to erect monuments on the lawn. The County also allows private groups to conduct recruiting, fund-raising and awareness activities on the lawn. Consequently, the court believes that one of the purposes of the Commissioners in approving Bush's request was to protect the public from potential liability should his request have been denied.

CANTICA II. CONCLUSIONS OF LAW

Canto A. **Justice the founder of my fabric mov'd:**
To rear me was the task of power divine,
Supremest wisdom, and primeval love.[17]

The First Amendment states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I. Like Dante needed Virgil, a court needs a guide to understand how this provision might impact a monolithic marble monument with engravings of the Commandments and the Mayflower Compact. Luckily, the Supreme Court simultaneously handed down two decisions regarding Commandments displays within the past thirteen months. One might think that two such recent precedents addressing the same subject would drastically simplify a trial court's quest in deciding whether the Monument at issue here withstands constitutional scrutiny. One might be wrong.

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[17] Alighieri, Dante, The Divine Comedy: Inferno, Cantica 1 (Allen Mandelbaum trans., Everyman's Library, 1995) [hereinafter Dante, and cited by cantica (Inferno, Purgatorio, Paradiso)].

In deciding the two cases involving the Commandments, the Supreme Court produced over one hundred thirty pages of text and a mere ten separate opinions. In McCreary, a five justice majority of the Supreme Court applied the persistent yet opaque Lemon test[18] to find the Commandments display in violation of the Establishment Clause. Conversely, in Van Orden v. Perry, 125 S.Ct. 2854 (2005), a plurality of the Court ignored the Lemon test and found the Commandments display constitutional, with Justice Breyers' tie-breaking use of "the exercise of legal judgment" test, which he assures us is not simply a judge's personal predilection. Subsequent to these decisions, an obviously frustrated Sixth Circuit court complained, "Thus, we remain in Establishment Clause Purgatory."[19]

With all due respect to the Sixth Circuit, the Purgatory description hardly seems appropriate from either a theologic or literary perspective. The Catholic Church defines Purgatory as a "purification, so as to achieve the holiness necessary to enter the joy of heaven."[20] Likewise, Dante describes Purgatory as a place where the dew of repentance washes off the stain

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[18] Lemon v. Kurtzman, 403 U.S. 602 (1971). The three prongs of the test are: (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster "an excessive government entanglement with religion." Id. at 612-613.

[19] American Civil Liberties Union of Kentucky v. Mercer County, 432 F.3d 624, 636 (6th Cir. 2005).

[20] Catechism of the Catholic Church, 1031.

of sin and girds the spirit with humility before the soul ascends to the ethereal realm of heaven.[21] Admittedly, such cleansing is entirely different from the punishment of the damned. Nevertheless, application of current Supreme Court jurisprudence on Commandments displays hardly feels purifying. Furthermore, nothing about being an unelected judge given license to second-guess the decisions of elected officials does much to engender humility. Consequently, Purgatory seems wide of the mark.

While only hyperbole would cause the court to analogize to Cocytus, the state of the Establishment Clause jurisprudence is hardly Paradise. Indeed, it may be more akin to Limbo. Dante envisioned Limbo as a place of sorrow without torment, illuminated by the light of reason and home to virtuous pagans unfit to enter the kingdom of heaven.[22] Yes, we are definitely in Limbo.

Whatever the analogy, the Sixth Circuit's complaint recognized that nothing close to a bright line test exists to guide either elected officials or judges in determining whether a government has established religion by displaying the Commandments. Not that a bright line test is inconceivable. Some might speculate that one faction of the Supreme Court would outlaw even the frieze depicting Moses on the Supreme Court building, while perhaps the other faction might find that displaying the Commandments never violates the Establishment Clause absent citizens being

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[21] Dante, Purgatorio, Cantica II.

[22] Dante, Inferno, Cantica I.

involuntarily forced to genuflect before them. Thus, while bright line tests are easy, quick and fun (i.e., the Holy Grail of the law), Limbo continues to be perhaps not only unavoidable, but also preferable.

Canto B. **Through me you pass into the city of woe:**
Through me you pass into eternal pain:
Through me among the people lost for aye.[23]

Before entertaining any hope of entering Limbo, however, the court is obliged to inquire, like an ersatz St. Peter, into the Plaintiffs' legal worthiness to even begin the journey. The doctrine of standing asks whether litigants are entitled to have a federal court resolve their grievance. Kowalski v. Tesmer, 543 U.S. 125 (2004). Determining this question involves an analysis of "both Constitutional limitations on federal court jurisdiction and prudential limitations on its exercise." Warth v. Seldin, 422 U.S. 490, 498 (1975). In order to have constitutional standing, a party invoking the court's authority "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Raines v. Byrd, 521 U.S. 811, 818-19 (1997) (quotation omitted). To demonstrate an adequate personal injury, a "plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or

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[23] Id.

hypothetical." City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983).

No physical injury is needed to confer standing. A plaintiff need not have a bout of nausea, or even a sleepless night. Additionally, standing is clearly conferred by non-economic religious values. Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir. 1973).[24] The non-economic injury must be directly effected, however, by the laws and practices against which a plaintiff's complaints are directed. Thus, allegations of a plaintiff's personal contact with a state-sponsored image suffice to demonstrate this kind of direct injury. Foremaster v. City of St. George, 882 F.2d 1485, 1490-91 (10th Cir. 1989).

A plaintiff may adequately show an injury-in-fact when he is forced to view a religious object that he wishes to avoid but is unable to avoid because of his right or duty to attend the government-owned place where the object is located. All a plaintiff need do is view the object and take offense. To say this is not exactly a rigorous standard would be the height of understatement. In any event, Plaintiff James Green obviously has met the standard. He disagrees theologically with the Monument, and is confronted with the Monument when compelled to go to the courthouse for business. In short, he is offended – that is apparently all it takes. Green has suffered Establishment Clause injury.

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[24] In Anderson, the Tenth Circuit upheld a courthouse display of the Fraternal Order of Eagles monument. The case has been deemed superceded by Van Orden and McCreary, although its statements on standing remain valid. See Society of Separatists v. Pleasant Grove City, 416 F.3d 1239, 1241 n.1 (10th Cir. 2005).

For ACLU-Oklahoma, however, it takes a bit more. An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interest it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). Through its representative Sharon Nichols, ACLU-Oklahoma seems to have proven (1) and (3). Nevertheless, the record at trial reflects nary a mention of the interests that the ACLU seeks to protect or the ACLU's purpose.[25] A court cannot take judicial notice of such things. The purpose of the ACLU-Oklahoma is not generally known within this jurisdiction and cannot be accurately and readily determined. While Plaintiffs' Complaint did allege the organization's purpose, the Defendants' Answer denied the allegation. ACLU-Oklahoma representative, Sharon Nichols, never mentioned the organization's purpose in her testimony. No stipulation of the parties mentions the organization's purpose. Plaintiffs did not even argue the ACLU-Oklahoma's purpose in their Motion for Partial Summary Judgment. Therefore, because of a dearth of evidence supporting the second prong of the Hunt test, the ACLU-Oklahoma lacks standing.

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[25] By contrast, for example, in Am. Civil Liberties Union of Ohio, Inc. v. Taft, 385 F.3d 641, 646 (6th Cir. 2004), the ACLU submitted an affidavit from its Executive Director explaining the organization's purpose.

Having found that Plaintiff James Green suffered an injury-in-fact, does not halt the further analysis of prudential considerations that may limit challenges courts are willing to hear. Secretary of State of Maryland v. Joseph H. Munson Company, Inc., 467 U.S. 947, 955-56 (1984). The prudential limitation strives to assure that a claim is not an abstract, generalized grievance that the courts are neither well-equipped nor well-advised to adjudicate. For example, a litigant normally must assert an injury that is particular to himself or to a distinct group of which he is a part, rather than one "shared in substantially equal measure by all or a large class of citizens." Warth v. Seldin, 422 U.S. at 499. The reason for this is two-fold: the limitation "frees the court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." United States v. Raines, 362 U.S. 17, 22 (1960). It further assures the court that the issues before it will be concrete and sharply presented. Baker v. Carr, 369 U.S. 186, 204 (1962).

In short, is it prudent for this court to hear this claim at this time? The issues certainly seem concrete and sharply presented. Plaintiffs have proven that they are offended. Plaintiffs have wholly failed, however, to prove that they were in any way, whether tangibly or intangibly, even slightly coerced into religiosity by the Monument. They are obviously not intimidated. No evidence has been provided to show that Plaintiffs suffer from the Monument any more than someone may suffer from a cloudy day, a splinter, or a flat tire.

In light of those conclusions, prudence might dictate that this court not decide this claim at this time.[26] The court is anxious, however, not to graft a heightened injury-in-fact requirement onto the standing issue and call it prudence. While perhaps standing could be employed more strictly,[27] it has not been so employed in these types of cases in this circuit. Therefore, the court declines to find that Plaintiff James Green lacks standing under the prudential limitation.

Canto C. Here Is Set Forth The Catechism of McCreary and Van Orden.

Because Plaintiff James Green is worthy under the doctrine of standing to bring his claim, attention must be directed at last to the merits of the claim itself. Of course, determining the merits means making our way through the Limbo created by McCreary and Van Orden. Because the court is obliged to perform a nuanced fact-specific inquiry, an exposition of the similarities and differences between the Monument and the Commandments displays in McCreary and Van Orden is necessary, and perhaps even useful.

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[26] In another Establishment Clause case, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982), the Court said that the "psychological consequence presumably produced by observation of conduct with which one disagrees" is not an injury sufficient to give standing under Article III.

[27] See generally, Bickel, Alexander M., The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Yale University Press, 1986).

In McCreary, the Commandments displays were located on government property – hanging inside the courthouse. The text of the Commandments was at first a very abbreviated version of the KJV. The idea to display the Commandments originated with county officials, who also ordered that the display be posted in a "high traffic area" inside the courthouse. The display contained a non-religious message explaining the historical significance of the Commandments. Also, it was part of a larger display containing non-religious totems, such as the Magna Carta and the lyrics of the Star Spangled Banner. One of the two displays was dedicated at a ceremony presided over by the Judge/Executive and his pastor. Both the Judge/Executive and the pastor made religious comments at the dedication.

Of course, the McCreary display did not originally include equal-sized replicas of other documents. These were added only after the ACLU sued to remove the displays. The counties passed a second resolution authorizing an expanded display, including the Commandments and other documents in smaller frames, all of which had religious overtones. The resolution itself had a consistent religious theme and was also posted with the expanded display. After the district court put a judicial kibosh on that display, the county retained new lawyers, appealed the court's ruling and set up a third display. This one included the Commandments with a more expansive translation along with other equal-sized historical documents accompanying it. The religious resolution passed with the second display was never rescinded. Justice Souter's opinion in McCreary emphasized the obvious: the evolution of the displays demonstrated the County's litigation machinations.

In Van Orden, the Commandments display was on government property – outside on the grounds of the Texas State Capitol. It was a granite monolith, similar in size to the Stigler Monument, that included two Stars of David and the Greek symbol for Christ. At the top of the monument was an emphasized line of text stating: "I AM the LORD thy God." It contained an inscription stating: "Presented to the people and youth of Texas by the Fraternal Order of Eagles of Texas, 1961." Thus, the idea for and funding of the Texas monument apparently did not originate with the government, but with a private group, who also chose its design and was responsible for its maintenance. The monument in Van Orden was likewise a part of a larger display of seventeen monuments and twenty-one historical markers commemorating the people, ideals and events that have composed Texan identity.

The circumstances regarding the Monument bear distinct similarities to the scenario in Van Orden. A private person donated the Monument. The Monument stands outdoors and is part of a larger display of other monuments. Unlike the Texas monument, the Stigler Monolith is devoid of other explicitly and solely religious symbols such as the Star of David or the Greek symbol for Christ. The Stigler Monolith does not have the large enhanced text proclaiming "I AM the LORD thy God," but instead includes the indisputably historical text of the Mayflower Compact.

All these similarities and differences with the Texas monument in Van Orden would seem to point towards the conclusion that the Monument does not run afoul of the Establishment Clause. Differences do exist, however, which might give a court pause. The Texas monument had existed for over forty years

without complaint or controversy. Also, people with a sophisticatedly artsy viewpoint might see the monument display in Texas as more cohesive, more integrated, more, well, artistic than the Stigler mélange. These differences are not fatal, however, to the continued existence of the Monument.

In providing the deciding vote in Van Orden, Justice Breyer took into consideration the placid longevity of the Texas monument. That monument had inspired no protests, rallies or legal challenges since 1961. No doubt the lack of hoopla regarding that monument was also a relevant consideration under McCreary's teaching that we consider the history and circumstances of the display's creation. Justice Breyer asserted that "a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this long-standing, preexisting monument has not." Van Orden, 125 S.Ct. at 2871 (Breyer, J., concurring).

This assertion provokes some difficult questions. For example, are now only "old" displays of religious text constitutionally permissible, or do "new" displays start out with a constitutional strike against them? Also, exactly why would a newer display be more divisive than an older one? Is it, as Justice Breyer suggests, because of our supposedly increased religious diversity? Or, is it because our nation is actually less religiously tolerant than earlier in our history? And relatedly, could such intolerance exist because the courts have so broadened the scope of potentially unconstitutional religious activity that they have actually magnified the state's hostility to religion while simultaneously providing federal court remedies for the slightest of hurt feelings? One could reasonably

ask whether anyone could have even envisioned a legal challenge to the Texas monument when it was first erected in 1961. This court does not feign to know the answers to these questions, or whether the questions themselves are valid. Nevertheless, one observation is now indisputable. No governmental action even touching upon religious subjects will fail to garner a congregation of eager litigants rapid to oppose it. Perhaps this is not so much evidence of government establishing religion as it is evidence of jurisprudence provoking litigiousness.

Justice Breyer did not intend that newer religious displays are automatically suspect. Such a position would be unworkable, not to mention somewhat illogical. The history and development of a display must be considered, but is not necessarily dispositive of the constitutional question. Logically, the objective effects of an edifice should often predominate in the analysis over governmental pronouncements occurring during the history of its creation. Long after such pronouncements are past and forgotten, the edifice and its objective effects will remain. Thus, the events occurring during the short life span of the Stigler Monolith would not necessarily transubstantiate it into a government establishment of religion. Anyway, the governmental pronouncements surrounding it are modest at most, and not religious at all.

In describing the collection of monuments on the Haskell County courthouse lawn, this court has used the term "mélange" and steered clear of more pejorative descriptions such as mish-mash or hodgepodge. The lawn and its displays may not be particularly similar to the "highly integrated" display on the grounds of the Texas capitol. Still, they are not

displeasing to the eye. The dangerous issue is how a judicial evaluation of the artistic or historical merits of a display may be accomplished without the court's personal predilections trumping the aesthetic evaluation already conducted by elected officials.

In McCreary, Justice Souter chided the defendants for including the Ten Commandments and the Magna Carta in its collection of "foundational" American documents while failing to include the text of the Fourteenth Amendment. Additionally, he observed that although the county courthouse contained other displays besides the Commandments, the Commandments display was not sufficiently "integrated" to form a secular display. Unfortunately, the McCreary opinion leaves us bereft of any inkling regarding the appropriate school of artistic, architectural or historical criticism that should be brought to bear on an analysis of the proper amount of "integration" in a display, or whether the texts are appropriately "historical" to the reviewing judge. The rather scary prospect of a court determining such things is partly avoided, however, by the requirement that the stated governmental purpose be genuine, not a sham and not merely secondary to a religious objective.[28] While the exact amount of deference to be accorded the artistic and historical choices of elected officials in government displays has never been explicitly articulated, the "not a sham" test sounds suspiciously close to the rational basis test, but with slightly more teeth.[29]

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[28] McCreary, 125 S.Ct. at 2725.

[29] Id. at 2736, n.13.

With regard to this Monument, the court has already found that the Commissioners' desire to accommodate Bush's display for its historical value was genuine. In light of that conclusion, this court is reluctant to gainsay the historical and artistic impressions created by the monuments collected over the years on the Haskell County courthouse lawn. Suffice it to say that the Haskell County courthouse lawn is pure Americana. True, there is no grand integral design of the various monuments and displays on the lawn. They were dreamed up, developed and deposited over the years, each reflecting that generation's view of what is appropriately historical, artistic and pretty. Perhaps the next generation will add the cannon or a nice shrubbery. In any event, this court does not fathom how artistic integration must be a bedrock constitutional requirement simply because a text of one of the displays contains religious sentiments.

The only similarity of any real concern between the Stigler Monolith and the Commandments display in McCreary is perhaps the associated hoopla, but important differences exist. No outcry or even interest was apparently produced by the Haskell Commissioners' actual vote to approve Bush's idea for the Monument's erection or in response to Bush's fund-raising efforts. No one else even attended the September 27, 2004 meeting. While the dedication for the Monument was undoubtedly religiously oriented, it was privately organized and publicized. Moreover, while two Commissioners did attend the Stigler dedication, they did not preside over it, or give a religion-tinged speech like the Judge/Executive in McCreary. No evidence proves that the Commissioners attended the dedication in their official capacity.

No evidence reveals that the news media hoopla was anything more than, well, standard news media hoopla. The Commissioners did not organize it or promote it. They did not seek out interviews. They answered questions and passively posed for pictures where and when asked. News media hoopla, without evidence of some active governmental reinforcement, does nothing more than reflect a spasmodic pang that temporarily sells media content but that a reasonable observer has forgotten by the next news cycle. For Establishment Clause purposes, it means little in the context of the evidence presented here.

The lack of government instigation of the news media hoopla is similar to the petition drive hoopla. Mike Bush, a private citizen, organized and implemented the petition drive in support of the Monument. Importantly, the petition drive was prompted by the commencement of the present litigation, not the erection of the Monument. The same goes for the Rally.

Oh yes, the Rally. Plaintiffs place great reliance on the Rally. Yet again, the Rally was not organized, or promoted by county government. The Rally was quite religious in nature, but it was quite political in nature as well. Mixing politics and religion may be akin to mixing water and phosphorus, yet it is rarely unconstitutional absent heavy government involvement. While a Commissioner attended, the court is not persuaded that a reasonable observer would believe he attended in his official capacity. He spoke a few defiant words, but those words were not religious.

After its erection, no rallies were held around the Monument before the commencement of this lawsuit. Indeed, after the dedication and initial spasm of media attention, the citizens of Haskell County apparently paid no more attention to the Monument than the Commissioners did during the design and erection process. In other words, none. All was placid and peaceful until Plaintiffs could no longer stand the level of their offense and filed a federal case. Undoubtedly, the Rally hoopla was not caused by the Monument, but rather by the lawsuit. It feels somewhat discordant for Plaintiffs to file a federal case, bask smugly in the resulting frenzy, and then claim that same frenzy is an effect of the government's establishment of religion.

With regard to the Monument's differences from the circumstances in McCreary, a number of other important ones exist. Significantly, the Monument is outside, not inside, the courthouse as in McCreary, or inside the classroom as in Stone v. Graham, 449 U.S. 39, 41-42 (1980). The Commandments display in classrooms was found unconstitutional in Stone not only because of the dangerous impressionability of school children, but also because those children were literally trapped inside in the presence of the display for hours at a time, day after day, week after week for the entire school year. Despite the somewhat hyperbolic claim of the Plaintiffs here that the Monument is unavoidable, their forced exposure to the Commandments in Stigler pales to figurative whiteout conditions in comparison to the school children in Stone. Quite simply, the Monument is not unavoidable to anyone wanting to conduct business at the courthouse, especially because it is not inside the courthouse itself. Furthermore, where it is situated cannot accurately be described as a particularly "high

traffic area" for people coming to the courthouse to conduct business.

Of course, the most significant difference between the Monument and the McCreary county case is that neither the idea nor the efforts for raising the Monument originated with the Haskell County Commissioners. Those same Commissioners did not pass any resolutions regarding the Monument laced with religious statements or themes. Those same Commissioners did not order the Monument placed in a "high traffic area" of government property. Indeed, other than approving Bush's concept, those same Commissioners seemed to exhibit little concern or even knowledge let alone exercise any control or even supervision over the wording, design, and construction of the Monument. While Bush may have added the Compact and the "Erected by" language to the Monument as a litigating position similar to McCreary, the Commissioners here took no part in such tactical shenanigans.[30] The Commissioners'

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[30] Initially, during the trial examination of Mike Bush, the court believed that Plaintiffs' counsel established that the Commissioners not only approved the addition of the Compact to the Monument, but also knew that it was added for litigation purposes. Despite the court's gentle remonstrances, Plaintiffs' counsel continued cumulative questioning on the subject. As a result, the actual state of the Board's scienter of the knowledge of the addition of the Compact now seems irredeemably ambiguous. Under these circumstances the court is not convinced that the Commissioners ever officially approved the addition of the Compact (no meeting minutes reflect they ever voted on it) or that they knew the Compact was added for litigation purposes. The court is persuaded that the Commissioners somehow had knowledge of the Compact eventually being part of the Monument, but when and how they acquired this knowledge

ongoing supervision of the Monument's morphing marble face shouts "Laissez-faire."

> **Canto D. Before me things create were none, save things**
> **Eternal, and eternal I endure.**
> **All hope abandon ye who enter here.**[31]

As obvious from reading the above analysis, navigating through Limbo by evaluating the present case in light of Van Orden and McCreary is indeed sorrow without torment. Like wandering in the wilderness for forty years, it really gets us little closer to the Promised Land. A trial court cannot simply decide that its case is more like Van Orden than McCreary and stop the pilgrimage. Instead, a court must also deal with the trinity of the Lemon test.

A majority of justices of the Supreme Court appear willing to exorcize the Lemon test, but they have not done so (yet). That test retains precedential value. As stated by this circuit subsequent to the decisions in Van Orden and McCreary:

> This Court will therefore continue to apply the Lemon test as modified by Justice O'Connor's endorsement test while remaining mindful that there is "no test related substitute for the

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remains a mystery. In all likelihood, they gained this knowledge the conventional way: everyone knows each other and word travels in Haskell County faster than the constant airspeed of a European swallow.

[31] Dante, Inferno, Canto I.

> exercise of legal judgment." Van Orden, 125 S.Ct. at 2867 (Breyer, J., concurring in the judgment).

O'Connor v. Washburn University, 416 F.3d 1216, 1224 (10th Cir. 2005). As a result, an analysis of the Monument under a modified Lemon test is required penance, an act of piety towards the law, and a mitzvah.

The "purpose prong" of the endorsement test asks whether the government's actual purpose is to endorse or disapprove of religion. Bauchman ex rel. Bauchman v. W. High Sch., 132 F.3d 542, 551 (10th Cir.1997). In applying the purpose prong, a court should examine the "traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." McCreary, 125 S.Ct. at 2733. Therefore, this court must evaluate the history of the Monument's display to decide if Haskell County's "ostensible and predominate purpose" in erecting it was to advance or endorse the Judaic or Christian religions. See id. at 2733.

As recognized by Van Orden, the Commandments are obviously religious, but "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." Id. at 2856. And, of course, Bush's motivations for erecting the Monument were religious. Whatever burden was laid on Bush's heart is mostly irrelevant to the analysis. The purpose prong of the endorsement test focuses on the intent of the government actor in displaying a particular work, not on the intent of the creator of the work. Summum v. City of Ogden, 297 F.3d 995, 1010 (10th Cir. 2002).

Neither the agenda of the September 27, 2004 Commissioners' Meeting, nor the minutes of that meeting, nor the undisputed testimony at trial regarding the content of the meeting reveal any religious purpose on the part of the Commissioners. While Bush revealed his religious motivation, the Commissioners discussed the historical significance of the Commandments. Furthermore, the Monument cost the County nothing. After deciding on the location for the Monument, the Commissioners took no further official action regarding it. They basically dropped out of the picture. Obviously a self-starter, Bush ran with the project, making all final decisions about the text, content and the style of the Monument. To the Haskell County government, the Monument basically fell on the courthouse lawn like manna from heaven.

The court is aware that two Commissioners apparently attended the religiously-toned dedication of the Monument. No evidence exists in the record, however, that the Commissioners were ever introduced or referred to in their official capacities or what, if anything, they may have said. This is far different than the situation in McCreary where the Judge/Executive made a religious speech. Furthermore, the court is aware that Commissioner Few attended the Rally and spoke at it. The words Commissioner Few spoke at the Rally, while defiantly defensive of the Monument, were not religious in nature. Plaintiffs also failed to prove that Commissioner Few was ever introduced in his official capacity.

Some officials are permitted the liberty of occasionally acting as mere private citizens. Perhaps the President and the governors of the fifty states

would not qualify for this category, but certainly commissioners of a small, sparsely-populated, rural Oklahoma county seem to fit the bill. To be sure, a Commissioner could appear at some public forums, and despite any protestations to the contrary, be appearing as nothing else but in his official capacity. For example, the Commissioners acted explicitly in their official capacities at the Monday, September 27, 2004 meeting to approve Bush's Monument project. With their appearances at the Monument dedication and the Rally, the capacity in which the Commissioners appeared is not quite clear. This lack of clarity stems entirely from the lack of evidence presented by the Plaintiffs on the issue.

The court concludes that the Commissioners did not attend the Monument dedication or the Rally in their official capacities. The facts of this case are nothing like those in Staley v. Harris County, where the district court concluded that a reasonable observer would believe that the county officials appeared in their official capacities particularly because they appeared at a rally "during business hours, referred to their County affiliations, and described the County's reaction to the lawsuit." 332 F.Supp.2d 1030, 1038 (S.D.Tex. 2004), aff'd, 2006 WL 2349223 (5th Cir. August 15, 2006). While the September 27, 2004 meeting was held during business hours, both the dedication and the Rally were held on the weekend. The dedication was on a Sunday, and the Rally was on a Saturday. No believable evidence exists that the Commissioners were ever referred to in their official capacities. Furthermore, given the nature of the humble tight-knit community in this rural Oklahoma county described by witnesses at trial, the court is not convinced that a reasonable observer would have

viewed these men as speaking or appearing for Haskell County government.

The Defendants spent much time at trial presenting evidence and arguing that the County did not endorse the messages of the other monuments on the lawn; ergo, the County did not endorse the Monument. After all, did Haskell County intend to endorse the Stigler High School Senior Classes of 1954 and 1955 to the exclusion of all other classes? Did it intend to endorse the Choctaw Nation to the exclusion of all other tribes? The argument is both viscerally and logically appealing. The amount of potential hurt feelings caused by those people not represented by "County-endorsed" monuments boggles the mind and would probably result in droves of citizens besieging the County demanding a monument representing them. The consequence would be a truly cluttered courthouse lawn. That is not what has happened. Therefore, the court concludes that the purpose of the County in approving any of the monuments was acceding to the wishes of various citizens and not endorsing the sentiments on the monuments.

The court is also mindful that the Commissioners testified that one of their purposes in approving the Monument was fear that a refusal would be a violation of Bush's free speech rights. No doubt the Commissioners view the Ten Commandments text as sacred and approve of the Commandments' mandates. Nevertheless, no actions or words spoken in their official capacities indicate that their own personal judgments were the motivation for approving Bush's erection of the Monument. Secret motives of government officials have been recognized as not

particularly relevant for determining official purpose.[32] What must be evaluated instead is the purpose as seen by an objective observer. Secret motives are hidden from an objective observer. Thus, Plaintiffs have failed to sustain the required burden of proof in showing that Haskell County's purpose in erecting the Monument was the ostensible and predominate purpose of advancing religion.

The "effect" prong of the endorsement test asks whether a reasonable observer aware of the history and context of the forum would find the display had the effect of favoring or disfavoring a certain religion. Bauchman, 132 F.3d at 551-52. The Constitution does not require, however, that the purpose of every government-sanctioned activity be unrelated to religion. Id. at 554 ("Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally."). Instead, the question of whether the government has endorsed a particular religious display depends in large part on the display's particular physical setting. Lynch, 465 U.S. 668, 671, 681-82, 685 (1984) (holding that a creche in a holiday display did not violate the Establishment Clause because the display also contained secular objects).

The effect prong of the endorsement test, however, presumes a reasonable observer "aware of the history and context of the community and forum" in which the display appears. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000) (quotation omitted); see McCreary, 125 S.Ct. at 2736. The awareness of this

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[32] See e.g. McCreary at 2735.

reasonable observer is not limited to "the information gleaned simply from viewing the challenged display." Wells v. City & County of Denver, 257 F.3d 1132, 1142-43 (10th Cir. 2001) (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995)(O'Connor, J., concurring in part and concurring in judgment)). The effect prong of the endorsement test, however, is a question of law that this court decides without reference to the reactions of individual viewers. Bauchman ex rel. Bauchman v. W. High Sch., 132 F.3d 542, 555 (10th Cir. 1997). Nevertheless, it is unclear just how omniscient a reasonable observer is deemed to be.

Plaintiffs argue that the Monument is overpowering in its girth and particularly situated in a prominent area of the lawn. These factors, they assert, would cause a reasonable observer to conclude that the effect of the Monument is government endorsement of its religious message. The Plaintiffs are incorrect. Quite simply, the Monument is not particularly large, and is not in a clearly high traffic area. It may face a busy street, but so do almost all the monuments on the lawn.[33] Furthermore, the Monument does not appear to be placed in an area that is the most frequented route taken to the courthouse by citizens going there to undertake business.

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[33] Sharon Nichols testified that she could easily read the Commandments from Main Street. The court does not doubt her visual acuity, but confesses to being unable to match it. During the court's view, the title of the Monument was readable from Main Street, but the text of the Commandments was not.

A reasonable observer would also see that the Monument is clearly passive in nature. In no way is it "in your face." For example, a monument containing only the Commandments made of white marble with bright red lettering might cause more concern. The Monument itself, however, is very sedate, with muted colors and tone.

A reasonable observer would be aware that the Commandments and the Compact are primarily and historically legal dictates, and would know that the lawn of a courthouse is particularly appropriate for historical codes to be displayed. Likewise, a reasonable observer would know that a courthouse lawn is often a community gathering place, a place where various events and sentiments are memorialized and that this courthouse lawn follows in that American tradition by hosting an array of monuments with diverse messages. While effete elitists may consider those messages to be a little maudlin or the monuments themselves a little kitschy, a reasonable observer would see an aesthetic flow. Perhaps not fully unified or integrated, the mélange does, however, clearly represent what Haskell County citizens consider the noteworthy events and sentiments of their county, their state and their nation.

A reasonable observer would see that the Monument is not the focus of the courthouse lawn. The mélange of monuments surrounding the one at issue here obviously detract from any religious message that may be conveyed by the Commandments. Just as the inclusion of Santa Claus and Frosty the Snowman detract from any religious message of the Baby Jesus and Mary in a government-sponsored Christmas display, so too do the other monuments on the Haskell

County courthouse lawn perform the same function here. Plaintiffs have failed to prove by a preponderance of the evidence that the Monument has the impermissible effect of advancing or promoting religion.

Canto E. Here Is Accomplished The Separation Of The Wheat From The Chaff.

In the Final Amended Pretrial Order [Docket No. 85] for this case, both parties stipulated that among the issues of law for the court to decide are: (1) "Whether the installation and maintenance of the Monument of [sic] the courthouse lawn creates an excessive entanglement of Government with religion" (the third prong of the Lemon trinity); and (2) "Whether the Monument violates the Oklahoma Constitution, Article II, Section 5." The court is obligated to make findings on all issues properly presented at a bench trial. "The court need only make a brief, definite, and pertinent findings and conclusions upon contested matters." 9A Wright & Miller §2579 at 541 (1995) (emphasis added). In this case, however, Plaintiffs have submitted no briefing or proposed findings or conclusions regarding these issues. The court therefore considers them

abandoned.[34] See Coston v. Petro, 398 F.Supp. 2d 878, 880-81 (S.D. Ohio 2005).

Unfortunately not abandoned at trial was the unexpected dispute over who actually owns the Monument – Bush or the County. Defendants took the surprising position that Bush still owned the Monument and could remove it at any time. Bush's alleged ownership is certainly consistent with his penchant for changing the Monument without County approval or oversight. In any event, the question of the Monument's ownership was never presented as a factual or legal issue in the Amended Pretrial Order. Therefore, the court declines to address it and cannot see how the issue would affect the outcome in any event.

Because the Monument does not violate the Establishment Clause, the court need not reach the Commissioners' affirmative defense that Bush's free speech rights may have required them to allow him to erect the Monument. The court will note, however, that the Commissioners' concern was not unfounded.

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[34] To the extent the court is required to address excessive entanglement, simply by virtue of the Lemon test being before the court, the court finds excessive entanglement is not present. The court must "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1261 (10th Cir. 2005) (citation and internal quotation marks omitted). This project was privately organized and pursued, with Haskell County merely providing a space for the Monument, as it previously had done for other private individuals and groups.

The Tenth Circuit, in Summum v. City of Ogden, 297 F.3d 995 (10th Cir. 2002) and Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997), held that by allowing private groups to erect monuments inscribed with the Ten Commandments, similar to the Stigler Monolith, the municipalities had created "nonpublic forums" or "limited public forums." The court will not delve into the Circuit's extensive analysis of those terms, but recognizes that, "[a] limited public forum arises where 'the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum.'" City of Ogden, 297 F.3d at 1002 (quoting Callaghan, 130 F.3d at 916). "Regulations of speech in a nonpublic or limited public forum are subject to the more deferential reasonableness standard." Callaghan, 130 F.3d at 916. The government may restrict access to a nonpublic or limited public forum and those restrictions "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Id.

Under the principles of the Summum cases, because Haskell County has allowed some private citizens to erect various monuments, the Haskell County courthouse lawn could arguably be considered a nonpublic or limited public forum. Unskilled in divination or prophecy, the court is uncertain whether the County would have been able to successfully defend an action by Mike Bush for violation of his free speech right. Had Bush been denied and decided to bring an action against the County, he likely would have argued that historical significance is one of the main criteria upon which the Commissioners base

their decisions to allow or not to allow monuments to be erected on the lawn. The court believes he could have established a rational basis for a belief that the Ten Commandments and the Compact have historical significance to Haskell County. Bush could also argue that his monolith complements the other monuments on the lawn and is therefore aesthetically pleasing, thus satisfying another of the County's criteria. As the court has already noted, decisions concerning aesthetics are better left to those voted into office by the electorate.

Nevertheless, the court does not reach the question of whether Bush had the absolute legal right to place his Monument on the lawn. Indeed, the facts of this case are distinct from those in the Summum cases given that the Ten Commandments monuments described in those cases themselves arguably created the nonpublic or limited public forums. The court merely notes that the Commissioners' concerns regarding Bush's free speech rights were not unjustified, and could have rationally been one of their purposes in approving the Monument.

CANTICA III. CONCLUSION

By approving Bush's plan to erect the Monument, Haskell County did not overstep the constitutional line demarcating government neutrality towards religion. Plaintiffs' request for injunctive and other relief is DENIED. The Monument does not violate the Establishment Clause and may remain on the courthouse lawn, peacefully and passively resting among the other monuments under the stars.

Dated this 18th day of August, 2006.

/s/

Ronald. A. White
United States District Judge
Eastern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 05-CIV-406-RAW

[Filed August 18, 2006]

JAMES W. GREEN, and AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA,	)
Plaintiffs,	)
v.	)
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF HASKELL, and HENRY FEW,	)
Defendants.	)

JUDGMENT

This matter came before the court at bench trial May 1-2, 2006. In accordance with the Opinion and Order filed contemporaneously herewith: IT IS ORDERED, ADJUDGED and DECREED that judgment is hereby entered in favor of Defendants and against Plaintiffs.

Dated this 18th day of August, 2006.

/s/

Ronald. A. White
United States District Judge
Eastern District of Oklahoma

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 06-7098

[Filed July 30, 2009]

JAMES W. GREEN, an individual; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA, a non-profit corporation,	)
Plaintiffs - Appellants,	)
v.	)
HASKELL COUNTY BOARD OF COMMISSIONERS, also known as Board of County Commissioners of Haskell County, Oklahoma; KENNY SHORT, in his official capacity as Chairman of the Haskell County Board of Commissioners,	)
Defendants - Appellees,	)
MAINSTREAM BAPTIST NETWORK; OKLAHOMA MAINSTREAM BAPTISTS;	)

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CENTER FOR LAW AND JUSTICE; THE NATIONAL LEGAL FOUNDATION; AMERICAN LEGION # 182; and FOUNDATION FOR MORAL LAW,

Amici Curiae.

ORDER

Before **HENRY**, Chief Circuit Judge, **TACHA, KELLY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, McCONNELL, TYMKOVICH, GORSUCH,** and **HOLMES**, Circuit Judges.

Defendants-Appellees' Petition for Rehearing En Banc is denied. A poll was requested. On a vote of six to six of the active members of the Court, rehearing en banc was denied. Fed. R. App. P. 35(a). Judges Tacha, Kelly, O'Brien, McConnell, Tymkovich, and Gorsuch would grant rehearing en banc.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

KELLY, Circuit Judge, dissenting from the denial of rehearing en banc, with whom **TACHA** and **TYMKOVICH**, Circuit Judges, join.

The court's decision in this case perpetuates a regrettable misapprehension of the Establishment

Clause: that recognition of the role of religion in this country's founding, history, traditions, and laws is to be strictly excluded from the civic sphere. The court's analysis misconstrues—and in so doing multiplies the errors inherent in—the Supreme Court's already-questionable "tests"[1] used to analyze passive acknowledgments of religion such as Ten Commandments monuments. The opinion strongly suggests that Ten Commandments displays authorized by small-town commissioners who harbor personal religious beliefs are unconstitutional establishments of religion. Such a conclusion is not only inconsistent with the original meaning of the Establishment Clause,[2] but is also plainly contrary to the Supreme

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[1] Whether Lemon v. Kurtzman, 403 U.S. 602 (1971), and its progeny actually create discernible "tests," rather than a mere ad hoc patchwork, is debatable. The judicial morass resulting from the Supreme Court's opinions "raises the . . . concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring).

[2] Public acknowledgments of religion at the founding and continuing to this day have been well-documented. See Van Orden, 545 U.S. at 686-90 (plurality opinion); McCreary County v. ACLU, 545 U.S. 844, 885-89, 895-900 (2005) (Scalia, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 672-678 (1984). In short, "[t] here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." Lynch, 465 U.S. at 674. The acknowledgment of the role of religion in our public institutions "follows the best of our traditions" and "respects the religious nature of our people." Zorach v. Clauson, 343 U.S. 306, 314 (1952). A mode of analysis that ignores this tradition of acknowledgment, and the original understanding of the Establishment Clause that it suggests, is suspect at best. See Marsh v. Chambers, 463 U.S.

Court's precedent in Van Orden v. Perry, 545 U.S. 677 (2005).

In accord with our precedent in O'Connor v. Washburn University, 416 F.3d 1216, 1223-24 (10th Cir. 2005), the court analyzed the constitutionality of the Ten Commandments display at issue in this case in light of Lemon v. Kurtzman, 403 U.S. 602 (1971), as modified by Justice O'Connor's endorsement analysis. While not advocating that test, I am satisfied, for present purposes, to remain within the Lemon framework despite the plentiful—and meritorious—criticism of it.[3] See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (collecting criticism of Lemon); County of Allegheny v. ACLU, 492 U.S. 573, 669-76 (1989) (Kennedy, J., concurring in part and dissenting in part) (critiquing the endorsement test); Michael Stokes Paulsen, Lemon Is Dead , 43 Case W. Res. L. Rev. 795, 800-25 (1993). What is troubling, however, is the court's inflexible adherence to Lemon and the endorsement test despite Van Orden, given

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783, 790 (1983) ("[H]istorical evidence sheds light . . . on what the draftsmen intended the Establishment Clause to mean.").

[3] Though not yet adopted by a majority opinion from the Supreme Court, a test focusing on actual legal coercion, rather than endorsement, appears the most faithful to the original meaning of the Establishment Clause. See Van Orden, 545 U.S. at 693 (Thomas, J., concurring); Lee v. Weisman, 505 U.S. 577, 640-43 (1992) (Scalia, J., dissenting); Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1987). Of course, under this standard, the display at issue would survive scrutiny. See County of Allegheny v. ACLU, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part).

that Lemon has been rejected by a majority of justices while Justice Breyer's controlling concurrence in Van Orden remains good law. See McCreary County v. ACLU, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (recounting criticism of Lemon by various justices); Marks v. United States, 430 U.S. 188, 193 (1977) (stating that the concurrence on the narrowest grounds controls).

This court's opinion contravenes Van Orden and misconstrues the endorsement analysis by (1) improperly creating a per se rule that new Ten Commandments displays are unconstitutional as long as someone files suit quickly; (2) placing too much emphasis on the fact that this was a small town, thereby making the effect of the Establishment Clause depend on the size of the community; and (3) conducting a subjective analysis rather than an objective analysis. Under a proper application of the Supreme Court's precedent, this Ten Commandments display is constitutional.

I. The Conflict with *Van Orden*

A. Factual Similarities

The disposition in this case cannot be reconciled with Van Orden, which ought to control given the substantial similarities between the operative facts in the two cases. As in Van Orden, this Ten Commandments display is located outside, on the grounds of a public building—here a county courthouse—along with other secular displays. These displays include a war memorial for World Wars I and II (the largest monument on the lawn); smaller monuments for Vietnam and Korea, the Choctaw

Nation, the unmarked graves in Haskell County, and the Classes of 1954 and 1955; as well as a sidewalk composed partly of "personal message bricks" commemorating various individuals and groups. Green v. Bd. of County Comm'rs of County of Haskell, 450 F. Supp. 2d 1273, 1274-75 (E.D. Okla. 2006), rev'd, 568 F.3d 784 (10th Cir. 2009). All of these monuments are within seventy-five feet of each other, and thus can all be considered to be a single group of monuments. Furthermore, the Ten Commandments display was not in the most prominent place on the courthouse lawn.[4] "The physical setting of the monument," therefore, "suggests little or nothing of the sacred." Van Orden, 545 U.S. at 702 (Breyer, J., concurring).

The fact that the monument is surrounded by other secular displays is of considerable importance under existing precedent. See id. ; County of Allegheny, 492 U.S. at 595-96, 598-600, 616-19 (plurality opinion); Lynch v. Donnelly, 465 U.S. 668, 692 (1984); O'Connor, 416 F.3d at 1228; cf. ACLU v. City of Plattsmouth, 419 F.3d 772, 779 (8th Cir. 2005) (en banc) (Bye, J., dissenting) (noting that the court upheld a display standing alone). And yet, the court dismisses this consideration out-of-hand, reasoning that the collection is less cohesive, integrated, and artistic than the collection in Van Orden. Green, 568 F.3d at 805-06. How an aesthetic critique of the monuments

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[4] The district court stated, "Quite simply, the Monument is not particularly large, and is not in a clearly high traffic area. It may face a busy street, but so do almost all the monuments on the lawn. Furthermore, the Monument does not appear to be placed in an area that is the most frequented route taken to the courthouse by citizens going there to undertake business." Green, 450 F. Supp. 2d at 1294 (footnote omitted).

distinguishes this case in any meaningful way from Van Orden is puzzling. Federal courts do not sit as landscape architects or arbiters of style to decide whether small-town commissioners have sufficiently sophisticated taste.

The court protests, perhaps too much, that the critical factor here is not mere aesthetics, but rather the failure to have a "unifying, cohesive secular theme." Id. at 806 n.16. That, too, is in the eye of the beholder; as I suggest below, the collection of monuments does have a theme—celebration of Haskell County's history and moral ideals. The display of monuments does not have to be comprehensive; it is enough that the display celebrates a selection of events, people, and ideals that mark and measure the lives of Haskell County's citizens. Moreover, the court's opinion has created a catch-22: the commissioners could either exercise direct control over the creation of monuments (rendering the message more likely to be identified with the government), or they could take a hands-off, neutral approach (creating the possibility of a disunified theme). Either way, under the court's opinion, the commissioners lose. Accordingly, we should not rely on such an easily manipulated rationale as "cohesiveness" to distinguish this case from Van Orden.

The only legally relevant consideration is whether there are sufficient other monuments such that, taken as a whole, the display conveys a secular moral and historical message. See Van Orden, 545 U.S. at 701 (Breyer, J., concurring) ("In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral . . . [a]nd . . . historical message."); see also

Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1140 (2009) (Scalia, J., concurring) (engaging in a Van Orden inquiry and noting the presence of fifteen permanent displays without inquiring as to their "integration" or aesthetic quality). This display most certainly does so—after all, the monument sits with other monuments celebrating Haskell County's history and honoring (among others) those who have made the moral sacrifice of giving their lives for the rights and liberties we hold dear. The setting clearly establishes that the monument exists in a "context of history and moral ideals." Van Orden, 545 U.S. at 701 (Breyer, J., concurring).

Moreover, the message conveyed by the collection of monuments is reemphasized by the display itself, as the monument contains not only the Ten Commandments, but also the Mayflower Compact. Green, 450 F. Supp. 2d at 1276. Until the court's opinion suggested otherwise, Green, 568 F.3d at 807-08, who would have suspected that the Mayflower Compact primarily contributes to a religious message by being paired with the Ten Commandments? At the risk of stating the obvious, the Compact pertains to the founding of our country (which is of some historical significance), and nothing suggests that the Compact's religious aspects were meant to predominate. If anything, the Compact demonstrates that the historical aspect of the Ten Commandments predominated. In any event, it is clear that the monument is "part of a display that communicates not simply a religious message, but a secular message as well." Van Orden, 545 U.S. at 701 (Breyer, J., concurring).

The setting of the monument and the presence of a clear historical and moral message are "strong" indications that the monument "conveys a predominantly secular message" and is therefore constitutional. Id. at 702 (Breyer, J., concurring). It is clear, of course, that the Ten Commandments display also conveys a religious message. See id. at 690 (plurality opinion). This alone raises no concern. "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." Id. (plurality opinion). It is also worth noting that the County did not pay for the monument. Additionally, as in Van Orden, the government "further distance[d] . . . itself from the religious aspect of the Commandments' message," id. at 701-02 (Breyer, J., concurring), in that the monument bore the inscription "Erected by Citizens of Haskell County,"[5] Green, 450 F. Supp. 2d at 1277. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) ("In context, a disclaimer helps remove doubt about state approval of [a] religious message."). This inscription, combined with the context of the display, leaves little doubt that the government itself did not communicate a predominantly religious message, but rather was merely providing space for yet another donated monument related to Haskell County's history.

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[5] The court dismisses this consideration, citing McCreary County, 545 U.S. at 871-72, because the inscription was added after litigation had begun. Green, 568 F.3d at 809. That is irrelevant. Unlike McCreary County, this notation was not a false, post-hoc rationalization; instead, it was quite true. As such, it serves to underscore the reasonable observer's view that the government did not intend to endorse religion.

B. Heckler's Veto

In the face of these similarities, the court relies on questionable grounds to distinguish this case from Van Orden. The court emphasizes "the sharp contrast between the timing of the legal challenges" in Van Orden and this case. Green, 568 F.3d at 806-07. The court correctly notes that Justice Breyer relied upon the *absence* of litigation as an indication of the display's constitutionality in his Van Orden concurrence, Van Orden, 545 U.S. at 702-03, but then reasons that the *presence* of litigation demonstrates that the government's display had the effect of endorsing religion. By treating the presence of litigation as having controlling weight, the court comes perilously close to creating a new bright-line rule: all new Ten Commandments displays are unconstitutional as long as someone is willing to exercise a heckler's veto by filing suit—and, assuredly, there will be someone. This position is untenable.

The Supreme Court has, in a slightly different Establishment Clause context, refused to allow hecklers to exercise a veto, and we should not permit such a veto here. See Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto . . . ."). According to the Court, "[a] litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence of entanglement." Lynch, 465 U.S. at 684-85. Just as the act of commencing a lawsuit cannot provide probative evidence of entanglement, it cannot provide evidence that the government action had the effect of endorsing religion either. The absence of litigation might suggest that

there was no endorsement of religion, but a great many factors motivate lawsuits; allowing this latter variable to act as a proxy for division of the community is neither factually nor logically warranted in every case.[6] As the district court stated, lawsuits over Ten Commandments displays are "not so much evidence of government establishing religion as they are evidence of jurisprudence provoking litigiousness." Green, 450 F. Supp. 2d at 1289. Legitimizing a heckler's veto would create the peculiar result that all new Ten Commandments displays will be deemed unconstitutional, whereas old ones will (generally) be deemed constitutional. Such a result is absolutely arbitrary and cannot be the result mandated by the Establishment Clause.

II. Flawed Endorsement Analysis

In addition to ignoring Van Orden, the court's endorsement analysis is wanting. Under the Lemon test as modified by Justice O'Connor, the government violates the Establishment Clause by impermissibly endorsing religion "if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or

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[6] This assumes, for present purposes, that divisiveness is actually a useful metric in the Establishment Clause context. Whether it actually is useful is open to question. See Richard W. Garnett, Religion, Division, and the First Amendment, 94 Geo. L.J. 1667 (2006). In any event, there would have to be some sign of divisiveness other than this litigation. See Zelman v. Simmons-Harris, 536 U.S. 639, 662 n.7 (2002).

preferred."[7] Bauchman v. West High Sch., 132 F.3d 542, 551 (10th Cir. 1997) (internal quotation marks omitted); see Lynch, 465 U.S. at 687-94 (O'Connor, J., concurring). Significantly, the endorsement inquiry is conducted from the point of view of a reasonable observer "similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual." Capitol Square Review & Advisory Bd., 515 U.S. at 779 (O'Connor, J., concurring) (internal quotation marks omitted). "Thus, we do not ask if there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion." Id. at 780 (internal quotation marks omitted) (brackets in original). Rather, we ask whether a reasonable observer undertaking an objective inquiry would conclude that the government's action had the effect of endorsing religion. See id. at 779 ("[T] he endorsement test creates a more collective standard to gauge the 'objective' meaning of the [government's] statement in the community." (internal quotation marks omitted) (brackets in original)). The panel opinion departs from this objective analysis and engages in a subjective

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[7] We need only consider the effect prong of the endorsement test, as the court declined to decide the case on the purpose prong. The court was wise to do so, as we have previously concluded that the purpose inquiry "is an unworkable standard that offers no useful guidance to courts, legislators or other government actors." Bauchman v. West High Sch., 132 F 3d 542, 552 (10th Cir. 1997). The Supreme Court has also concluded that the purpose prong is rarely determinative. McCreary County, 545 U.S. at 859. Unfortunately, because the court relied almost entirely on indicators of purpose to determine the effect of the monument in this case, we also must consider matters usually reserved to the purpose prong of the endorsement test.

inquiry that takes all the facts in the light of an ultra-sensitive observer rather than a reasonable observer.

A. Improper Reliance on the Motivations of a Private Citizen

The court erroneously imputes the motives of a private citizen to the commissioners for the purpose of finding a government endorsement of religion, placing considerable importance on the fact that the "reasonable observer would be aware of [the private donor's] religious motivation for seeking the erection of the Monument." Green, 568 F.3d at 800. However, a truly objective inquiry would not impute a private citizen's motivations to the commissioners simply because they accepted his proposal. While the reasonable observer might have been aware that Mr. Bush had religious motivations in proposing the monument, the reasonable observer would not make the logical leap that the commissioners must therefore have shared his religious motives. Such a leap needlessly imputes a religious motive to the government, as it ignores the fact that the commissioners discussed the historic importance of the display and stated that the monument should be permitted based on the county's policy of neutrality in accepting displays. See Green, 450 F. Supp. 2d at 1275-76, 1292-94.

Moreover, the court comes perilously close to engaging in a subjective inquiry that penalizes private citizens for their religious beliefs, improperly using the Establishment Clause "as a sword to justify repression of religion [and] its adherents from any aspect of public life." McDaniel v. Paty, 435 U.S. 618, 641 (1978)

(Brennan, J., concurring). We should not be using the fact that the private donor had an "unalloyed religious motivation," Green, 568 F.3d at 801 n.10, as proof certain that the Establishment Clause has been violated. Sadly, we seem to have reached the day where we construe the Establishment Clause, meant to protect religion, so as to discourage people of faith from participating in the civic arena. See Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2206 (2003) ("[O]ne of the principal arguments against establishment was that it was harmful to religion. . . . Disestablishment 'advanced' religion.").

The court suggests that, while the motivation of a private citizen is irrelevant under the purpose prong of the endorsement test, it is significant for the effect it has on the reasonable observer's view of the monument. Green, 568 F.3d at 801 n.10. This is a distinction without a difference. Under the purpose prong, "we must scrutinize the *government's* intent; thus, where the challenged conduct is the selection or display of artwork, the artist's inspiration or intent is irrelevant." Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1031 (10th Cir. 2008). Similarly, under the effect prong, what counts is whether the reasonable observer would conclude that the *government's* objective act has the effect of advancing religion. Accordingly, whether a private citizen subjectively intends that the monument have the effect of advancing religion is irrelevant to an objective effect inquiry.

B. Erroneous Emphasis on Community Size

The court also construes the endorsement test so as to disadvantage small communities. The panel opinion relies on the fact that "Haskell County is a place where everyone knows each other." Green, 568 F.3d at 801 (internal quotation marks and brackets omitted). According to the court, Haskell County's small size means that the reasonable observer would conclude that the commissioners' statements of support for the monument "reflect a government endorsement of religion." Id. at 802. By reaching this conclusion, the court all but creates a presumption that small-town commissioners' statements are official statements, and having done so, treats them as indicative of an endorsement of religion.

Such reasoning leads to a completely untenable result: that the Establishment Clause means one thing in small-town America and something different in a metropolitan area. This cannot be correct—not only from a First Amendment perspective, but also from the standpoint of announcing law that is uniform and predictable. It is telling that the court cited no legal authority or evidence for the proposition that members of a small community are more likely to view an elected representative's statement to be official speech. It is just as likely that a commissioner's neighbors in a small town would realize that the commissioner was simply speaking for himself. Certainly, context is important to an Establishment Clause inquiry, see McCreary County, 545 U.S. at 866, but there is no reason in the law to create a presumption that all statements by small-town commissioners arise in their official capacity, any more than we should attribute a

sectarian purpose to the commissioners' actions without proof more compelling than this case offers.

Even if the small size of Haskell County should create a presumption that all statements by county officials reflect government policy, that presumption is rebutted by the facts of this case. The court relies upon religious statements by a commissioner as well as the presence of the commissioners at a dedication ceremony and a rally for the Ten Commandments monument to demonstrate a sectarian purpose on the part of the government. Green, 568 F.3d at 801-02. However, neither the statements nor the commissioners' presence at the ceremonies should be controlling considerations.

First, while the court places great emphasis on the religious statements of the "commissioners," only one commissioner actually made religious statements. Green, 568 F.3d at 802. Further, these statements were phrased in the first person, suggesting that the statements merely reflected that commissioner's personal beliefs—which, of course, are irrelevant to our inquiry. See McCreary County, 545 U.S. at 863 ("Establishment Clause analysis does not look to the veiled psyche of government officers."); Clayton v. Place, 884 F.2d 376, 380 (8th Cir. 1989) ("We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable."). It does not follow, then, that the personal statements of one commissioner shed any light whatsoever on the government's policy. Even assuming that one commissioner voted for the monument for religious reasons (which is by no means clear), that

commissioner's statements are not probative of whether the other two commissioners voted to accept the placement of the monument in order to endorse religion. Quite simply, the purpose of the government cannot be divined from one commissioner's personal statements when there are three commissioners.[8] A truly reasonable observer would not assume otherwise.

Second, the commissioners' presence at the dedication ceremony and rally does nothing to demonstrate a sectarian effect. Commissioners can be expected to attend most any public function, especially in a small town. Attendance does not necessarily indicate endorsement; rather, it reflects what elected officials do—including attending functions and representing the constituency. The reasonable observer would not conclude that the mere presence of the commissioners at the ceremonies suggests an endorsement of religion. That is why other courts confronting a similar situation have not found the mere presence of public officials at commissioning ceremonies to be particularly relevant to the endorsement inquiry. See Van Orden, 545 U.S. at 682 (plurality opinion) (two state legislators presided over dedication ceremony of Ten Commandments monument); Card v. City of Everett, 520 F.3d 1009, 1012 (9th Cir. 2008) (mayor accepted Ten

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[8] The court also relies on the fact that the commissioners made non-religious statements expressing their support for defending the monument in litigation. Green, 568 F.3d at 801-02. However, these statements are perfectly innocuous, and indeed can be expected of any official in relation to litigation brought against the government. That the commissioners did not immediately buckle to threats of litigation or issue disclaimers hardly suffices for proof of endorsement of religion.

Commandments monument at ceremony); cf. McCreary County, 545 U.S. at 851 (judge-executive not only attended the dedication ceremony for the Ten Commandments monument but also delivered a religious address).

While the court relies on this tenuous evidence of endorsement, it conspicuously neglects other contrary considerations. The commissioners never said that they were approving the monument for religious reasons. To the contrary, the record reflects that the commissioners discussed the historical aspect of the monument at the meeting where the monument was accepted. The county also had an informal policy regarding the erection of monuments that was perfectly neutral. Green, 450 F. Supp. 2d at 1275-76. This neutral policy warrants further mention as it, combined with the wide variety of monuments displayed at the courthouse, does much to negate any possible message of endorsement. The fact that there were monuments for the Classes of 1954 and 1955 does not mean that the County preferred those classes over those graduating in 1957 or any other year. Nor does the presence of a monument for the Choctaw mean that the County approved of that tribe more than any other. If some other group feels lonely or neglected, they can donate a monument too under County policy. So it is with the Ten Commandments monument. These considerations dispel any notion that the display of this Ten Commandments monument violated the Establishment Clause by endorsing religion. See Capitol Square Review & Advisory Bd., 515 U.S. at 781 (O'Connor, J., concurring) (stating that a reasonable observer would know that many displays had been permitted at the park). I note that this conclusion, unlike that of the court, is consistent with

the decisions reached by the other circuits that have considered Ten Commandments displays since Van Orden. This case is an outlier. See Card, 520 F.3d at 1020-21 (monument on government property); City of Plattsmouth, 419 F.3d at 776-77 (same); see also ACLU v. Mercer County, 432 F.3d 624, 636-40 (6th Cir. 2005) (display in a courthouse).

III. Conclusion

The court has gone much further than the Supreme Court's precedent mandates in looking for that ever-pernicious "endorsement" of religion. The Establishment Clause does not require government to avoid any action that acknowledges religion. See Van Orden, 545 U.S. at 683-84; Lynch, 465 U.S. at 672-78. To the contrary, "[g]overnment must inevitably take cognizance of the existence of religion," Abington Sch. Dist. v. Schempp , 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), and, I might add, its role in our history. Accordingly, the courts must walk a delicate balance, enforcing the Establishment Clause while avoiding the "risk [of] fostering a pervasive bias or hostility to religion." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845-46 (1995).

Here, the court failed to maintain that balance by completely eliding the fact that there is a genuine secular purpose for the display and by straining to avoid the conclusion that the primary effect of the monument was not the endorsement of religion. It is more likely, given the facts of this case, that a reasonable observer will perceive from the razing of this monument a message of *dis*approval of religion. At the very least, removing this monument demonstrates a "callous indifference" toward religion neither

required nor permitted by the Establishment Clause. Zorach, 343 U.S. at 314. In sum, I fear that the breadth of the court's opinion will have far-reaching effects that tend to unnecessarily undermine communities' ability to display Ten Commandments monuments, particularly small communities. I therefore respectfully dissent from the denial of rehearing en banc.

GORSUCH, Circuit Judge, joined by **TACHA**, **KELLY**, and **TYMKOVICH**, Circuit Judges, dissenting from the denial of rehearing en banc.

Respectfully, I believe we should have reheard this case for at least three reasons. First, by applying the *Lemon* test to a Ten Commandments display after *Van Orden*, the panel's analysis conflicts with the views of several of our sister circuits. Second, by then focusing on the perceptions of an unreasonable and mistake-prone observer, the panel's analysis conflicts with the Supreme Court's explanation of *Lemon*'s endorsement test and our sister circuits' application of it. Finally, by making us apparently the first court of appeals since *Van Orden* to strike down an inclusive display of the Ten Commandments, the panel opinion mistakes the Supreme Court's clear message that displays of the decalogue alongside other markers of our nation's legal and cultural history do not threaten an establishment of religion.

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In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court announced a tripartite test for deciding Establishment Clause disputes. Since then, *Lemon* has

been criticized by many members of the Court,[1] and a variety of legal scholars.[2] The resulting confusion about whether and to what extent *Lemon* continues to control Establishment Clause analysis was exacerbated by a pair of cases handed down the same day several years ago—*McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005). In the former case, the Court held that local

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[1] *See, e.g.*, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (collecting criticisms of *Lemon* by various members of the Court); *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., dissenting); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 655-56 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346-49 (1987) (O'Connor, J., concurring in the judgment); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting); *Committee for Public Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

[2] *See, e.g.*, Gerard V. Bradley, Protecting Religious Liberty: Judicial and Legislative Responsibilities, 42 DePaul L. Rev. 253, 261 (1992); Richard W. Garnett, Religion, Division, and the First Amendment, 94 Geo. L.J. 1667 (2006); Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. 1373, 1380-88 (1981); Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 118-20 (1992) (noting the inconsistencies of the "aptly named '*Lemon*' test"); Michael Stokes Paulsen, Lemon Is Dead, 43 Case W. Res. L. Rev. 795 (1993); Kenneth F. Ripple, The Entanglement Test of the Religion Clauses—A Ten Year Assessment, 27 U.C.L.A. L. Rev. 1195, 1216-24 (1979); Gary J. Simson, The Establishment Clause in the Supreme Court: Rethinking The Court's Approach, 72 Cornell L. Rev. 905 (1987).

government officials in Kentucky erected their display with the undeniable *purpose* of advancing religion, in apparent violation of the first part of *Lemon*'s multi-pronged test, *see McCreary*, 545 U.S. at 860-63, and then engaged in various shenanigans designed to obscure that fact, *see id.* at 855-57, 866. By contrast, in the latter case, Justice Breyer's controlling concurrence upheld a display on the grounds of the Texas State Capitol because he concluded the monument in that case advanced the *secular* purpose of illustrating the ideals of Texans. *See Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment). Neither the plurality nor Justice Breyer relied on *Lemon* to uphold the monument in *Van Orden*; indeed, they seemed to eschew it. *See id.* at 686 (plurality op.) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."); *id.* at 700 (Breyer, J., concurring in the judgment) ("I see no test-related substitute for the exercise of legal judgment.").

McCreary and *Van Orden*'s mixed messages have left the circuits divided over whether *Lemon* continues to control the Establishment Clause analysis of public displays. Shortly after *McCreary* and *Van Orden*, we held that *Lemon* continues to govern this domain, *O'Connor v. Washburn University*, 416 F.3d 1216, 1224 (10th Cir. 2005), and the panel in this case understandably felt obliged to follow *O'Connor*'s course. *See also Staley v. Harris County, Texas*, 461 F.3d 504, 508 n.6 (5th Cir. 2006); *Skoros v. City of New York*, 437 F.3d 1, 17 (2d Cir. 2006); *American Civil Liberties Union of Kentucky v. Mercer County, Kentucky*, 432 F.3d 624, 636 (6th Cir. 2005).

But as time has marched on, a number of other circuits giving careful consideration to *Van Orden* and *McCreary* have come to a different view. These circuits have held that the "legal judgment" test Justice Breyer discussed in his *Van Orden* concurrence supplants *Lemon* at least in some areas. For example, the Ninth Circuit has held that *Van Orden* "carv[es] out an exception" from *Lemon* for displays of the decalogue. *Card v. City of Everett*, 520 F.3d 1009, 1018 (9th Cir. 2008). And the *en banc* Eighth Circuit, "[t]aking [its] cue fromChief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*," has said that it will "not apply the *Lemon* test" to passive displays of the Ten Commandments. *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc). The Fourth Circuit has reached much the same conclusion, jettisoning *Lemon* in a case concerning the voluntary recitation of the Pledge of Allegiance in public schools. *Myers v. Loudon County Public Schs.*, 418 F.3d 395, 402 (4th Cir. 2005).

We should have reheard this case to reconsider *O'Connor* in light of these more recent developments in our sister circuits. This is not to fault *O'Connor* or the panel: intermediate appellate judges seeking to identify the rule of law that governs Establishment Clause challenges to public monuments surely have their hands full after *McCreary* and *Van Orden*. At the same time, our sister circuits have offered us much new learning since *O'Connor* and we should have taken this opportunity at least to consider it. By failing to rehear this case *en banc*, we decline the opportunity to begin aligning the circuits ourselves; as a result, at least until our superiors speak, we leave the state of

the law "in Establishment Clause purgatory." *Mercer*, 432 F.3d at 636.

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Even if *Lemon*'s test does control, the panel's opinion misconstrues it in a manner that yields another split between us and our sister courts. Until today, the premise of *Lemon*'s endorsement test was that the reasonable observer, through whose eyes an alleged endorsement is evaluated, was someone who got things right. A cousin of the "reasonable man" of tort law, the reasonable observer sees things as they really are. He is not the sort of person "'who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'" *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring) (alteration in original) (quoting W. Page Keeton et al., Prosser & Keeton on Law of Torts 175 (5th ed. 1984)). He focuses on "the 'objective' meaning of the [government's] statement in the community," informed by the "history and context of the community and forum in which the religious display appears," as well as the "the general history of the place in which the [religious message] is displayed." *Id.* at 779-81 (first alteration in original) (internal quotations omitted).

Employing such a reasonable person, our sister circuits that have applied *Lemon* to public displays similar to Haskell County's have upheld them. In *Mercer*, the Sixth Circuit sustained a display that included the Ten Commandments, the Bill of Rights, the Declaration of Independence, the Mayflower

Compact, Magna Carta, the Star-Spangled Banner, the motto "In God We Trust," the Preamble to the Kentucky Constitution, and Lady Justice. *Mercer*, 432 F.3d at 626. The court found that these items together conveyed the "unmistakable message of the County's acknowledgment of legal history." *Id.* at 638 (internal quotation omitted). Similarly, just before *McCreary* and *Van Orden* were decided, the Seventh Circuit upheld a nearly identical display in Indiana, finding that, in such a context, the Ten Commandments were celebrated "for their historical contribution to the development of American legal and political traditions." *Books v. Elkhart County*, 401 F.3d 857, 868 (7th Cir. 2005).

The panel in our case reached the opposite conclusion because its observer is not the reasonable observer of Justice O'Connor's description, but rather an admittedly *un*reasonable one. He just gets things wrong. For example, while the reasonable observer's job under *Lemon*'s second prong is to evaluate the monument's "objective meaning of the [government's] statement in the community," our observer spends most of his time doing something entirely different—speculating about whether the government might have secretly shared the private intent of the monument's *donor*. (And does so even after the panel holds that the display does not offend *Lemon*'s first, purpose prong. Panel Op. at 25.)

Not only does our observer do the wrong job, he does it poorly. One of his chief skills, at least according to Justice O'Connor, is the ability to distinguish between private and governmental speech. *See Pinette*, 515 U.S. at 782 (O'Connor, J., concurring) ("The reasonable observer would recognize the distinction

between speech the government supports and speech that it merely allows in a place that traditionally has been open to a range of private speakers accompanied, if necessary, by an appropriate disclaimer."). Our observer is able to keep this distinction in mind for awhile: when it comes to the donor himself, our observer recognizes that Mr. Bush's comments do not represent the government's views. But he promptly forgets the distinction when he reads in the newspapers that a single county commissioner has made religious remarks, all phrased in the first person. As the panel opinion acknowledges, these statements were made in the commissioner's private capacity, and he was under no obligation to censor his personal views. Panel Op. at 34. Nevertheless, our observer *erroneously* attributes these remarks to the county government. *Id.* at 34-35.

Why does the panel's reasonable observer make such mistakes of law? It is because, the panel tells us, our observer is from a small town, where such errors cannot be helped. Even though—in contrast to denizens of Austin, Texas or Denver, Colorado—he probably knows his local government officials as friends and not as magistrates, the panel's small-town observer is somehow *less* likely to know when the official in question is speaking his own mind rather than giving an official address. The panel offers no authority or evidence in support of its sociological conjecture, yet uses it to overrule the district court's contrary factual finding.[3]

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[3] Like the district court, I would have thought that, if anything, Haskell County's size cuts in the opposite direction. I would have expected that, in small communities, people may already know a

Next, our observer considers the speech of a different commissioner at the monument's unveiling, looking again for some untoward governmental purpose. This commissioner says nothing religious. Still, our observer leaps to the conclusion that, because the commissioner did not specifically *disclaim* any religious motivation, he must have shared the private donor's religious purposes. Panel Op. at 35. This even though the commissioner *never* endorsed the private donor's religious statements. And even though the county's display *itself* supplied an indication of its secular meaning by including the decalogue not just in a larger display celebrating cultural and historical influences but also on a stone bearing an inscription of another important piece of our legal tradition, the Mayflower Compact.

Mistake piles on mistake as our observer suspects that the government harbors some nefarious intent because it refused to raze the monument when this lawsuit was threatened. Hearing that some lawyers have presented some "clearly voiced Establishment Clause concerns," Panel Op. at 36-37, our observer does not pause to evaluate whether these concerns are meritorious, or wait for the resolution of the litigation. Instead, he assumes that when local governments say

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public official's private opinions and often realize their friends and acquaintances are speaking for themselves ("There goes Johnny again spouting off...."). By contrast, if a city councilman in New York is quoted in the local paper, the only thing most readers are likely to know about her *is* that she is a government official. At the very least, I see no reason based in law or the record to prefer the one or the other guess about the import of Haskell County's size to the reasonable observer's perception about a single commissioner's two brief statements to the media.

they intend to defend a lawsuit and leave the monument standing unless ordered to do otherwise, that indicates an endorsement of religion.

Finally, our observer is something of an art critic. He complains that the Haskell County's courthouse lawn display does not have "a unifying, cohesive secular theme," resemble a "unified exhibit in a 'typical museum setting,'" or at least appear to be "associated with intellectual experimentation." Panel Op. at 40-41 & n.16. But here, too, our observer is mistaken. The display *does* have a unifying theme: it memorializes and celebrates people and ideals important to Haskell County. Our observer's real problemseems to be with the lack of any central planning behind the courthouse display. He would have felt better if someone in county government had sat down and made a list of those things important to people in Haskell County, and then commissioned thematically consistent monuments reflecting the items on the list. Haskell County's mistake was to leave it up to the people of the county to determine the content of its "mélange," Panel Op. at 39, by allowing them to donate monuments of their choosing.

One can't help but ask wonder other familiar public memorials would fail our observer's aesthetic standards. What is, say, the unifying theme behind the Congress's collection of monuments in Statuary Hall, which includes likenesses of George Washington (Virginia), Brigham Young (Utah), and Father Junipero Serra (California)? It is only that the Congress has invited the States to donate two monuments of their choosing. These individuals, some of whom were religious figures, are commemorated only because they are important to the people of the

States; the lack of any *other* unifying theme hardly renders it difficult to understand the secular importance of the latter two men.

Exactly the same should hold true here. Rather than focusing on the aesthetic qualities of Haskell County's display, it should be enough that there is no indication that county officials had any sort of policy by which they discriminated among proposed monuments based on the message they communicate. The history of the courthouse lawn suggests the county approved most any donated monument that had some connection to the history and people of Haskell County. If the class of 1955 wanted to donate a bench, so be it; as Judge Kelly indicates, it doesn't mean the county dislikes the class of 1956. If the Choctaw Nation wanted a commemorative monument, so be it; there's no indication other Indian nations can't also donate one. And if a group wanted a monument with the decalogue and Mayflower Compact, the natural inference is that county government thought, 'so be it.'

What the majority calls "the very significant magnitude of the evidence indicating an impermissible endorsement," Panel Op. 47, consists of the facts I have just recounted: the private donor's intent, the statements of a single commissioner in his concededly private capacity, the county's refusal to buckle to litigation pressure, and the county's perceived lack of artistic taste. None of this, of course, is evidence that the Constitution was violated. But to our observer, apparently it can be *mistaken* for such evidence. And the only thing keeping the veil over our observer's eyes is the novel view that in "the context of the small community of Haskell County," reasonable observers make unreasonable mistakes. Panel Op. at 47, *see also*

id. at 32, 35. The result is not simply a misapplication of the reasonable observer test: it is a rewriting of that test in a manner inconsistent with our sister circuits' application of it.

3

Whatever test we are supposed to apply, or the number of its prongs, the Supreme Court's central message in *McCreary* and *Van Orden* was that public displays focusing on the ideals and history of a locality do not run afoul of the Establishment Clause just because they include the Ten Commandments. The panel's decision denies the precedential force of this holding and makes us the first circuit court since *McCreary* and *Van Orden* to strike down such an inclusive display.

While problems may arise when the Ten Commandments are displayed alone, or as part of a patent attempt to advance a religious message, *McCreary*, 545 U.S. at 867; *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), the Supreme Court has made clear that the decalogue's influence isn't just religious. In inclusive displays on places like courthouse lawns, the Ten Commandments can convey a "secular moral message" about the primacy and authority of law, as well as the "history and moral ideals" of our society and legal tradition. *Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring in the judgment). Neither is this surprising. Though their influence may be indirect, it is "undeniable" that "the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World." *Stone*, 449 U.S. at 45 (Rehnquist, J., dissenting); *see also Edwards v. Aguillard*, 482 U.S.

578, 594 (1987) (rejecting the suggestion that "the Ten Commandments played an exclusively religious role in the history of Western Civilization"); *State v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013, 1024 (Colo. 1995) (noting that "at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards" of conduct later embodied in law). And quite apart from their content, Moses' tablets have become an archetypal symbol for law itself, what other courts have called "a secular symbol for the rule of law." *King v. Richmond County, Georgia*, 331 F.3d 1271, 1277 (11th Cir. 2003).[4]

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[4] Each House of Congress apparently agrees, having passed concurrent resolutions in 1997 affirming that "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization"; that they "set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society"; and that they "are a declaration of fundamental principles that are the cornerstone of a fair and just society." Brief of the United States as Amicus Curiae Supporting Respondents at 9, *Van Orden v. Perry*, 545 U.S. 677 (citing S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H.R. Con. Res. 31, 105th Cong., 1st Sess. (1997)). As President John Quincy Adams put it, "[t]he law given from Sinai was a civil and municipal as well as a moral and religious code; it contained many statutes . . . of universal application—laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws." *Id.* (quoting *Letters of John Quincy Adams, to His Son, on the Bible and its Teachings* 61 (James M. Alden ed., 1850)). Even in *Stone*, while invalidating a state law requiring that the Ten Commandments be posted by themselves in public school classrooms, the Court took pains to emphasize that they may be "integrated into . . . the school curriculum. . . in an appropriate

For just such reasons, we are long accustomed to seeing the decalogue—sometimes alongside the Mayflower Compact, the Magna Carta, or the Declaration of Independence—in and around courthouses and other public buildings associated with the administration of law. The Ten Commandments appear in displays at the State Capitol and in front of a city hall in Colorado, in front of a Kansas municipal building, before a county courthouse in New Mexico, and in public parks in Utah and Wyoming—just to mention some examples in our own circuit. Our Nation's capital practically abounds with the Commandments: at the Library of Congress, outside the (relatively new) Ronald Reagan International Trade Building, at the National Archives, inside and outside the Supreme Court building and even on its doors. *See generally Van Orden*, 545 U.S. at 688-89 (plurality opinion) (providing examples). The upshot of *McCreary* and *Van Orden* is that this reality does not violate the First Amendment.

While I would prefer to rehear this case to determine whether and how *Lemon* applies, the fact remains that regardless of all this the panel's opinion is simply inconsistent with the most analogous decision of the Supreme Court. Even if we can't be sure anymore what legal rule controls Establishment Clause analysis in these cases, we should all be able to agree at least that cases like *Van Orden* should come out like *Van Orden*. If this seems facile, that's because it is. But the most elemental dictate of legal reasoning always has been and remains: like cases should be

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study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S. at 42.

treated alike. Whatever else might be said, if an inclusive display where the decalogue makes an appearance was acceptable to the Supreme Court in *Van Orden*, similar displays should be acceptable to us.

I respectfully dissent from the denial of rehearing *en banc*.

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IN THE

Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, ET AL.,
Petitioners,

—v.—

JAMES W. GREEN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Tenth Circuit properly refused to abandon the contextual analysis long applied by this Court to religious displays in Establishment Clause cases, in favor of a blanket rule insulating virtually all governmental displays of Ten Commandments monuments from constitutional review?

Whether a person who regularly visits government land on which a sectarian religious symbol is displayed near the seat of local government, and thus comes into direct and unwelcome contact with that symbol, has Article III standing to bring an Establishment Clause challenge to the governmental display?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The American Civil Liberties Union of Oklahoma has no parent corporations, and no publicly held corporation owns ten percent or more of the American Civil Liberties Union of Oklahoma.

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STATEMENT OF THE CASE

A. Factual Background

1. *Official Approval of the Haskell County Decalogue.* Haskell County's courthouse lawn stood without any religious monument for more than fifty years. In September 2004, however, in the wake of a nationwide furor over a large Ten Commandments monument placed in the Alabama State Judicial Building by Alabama Supreme Court Justice Roy Moore, the Haskell County Board of Commissioners approved the display of its own Decalogue. During one of the Board's regularly scheduled meetings, Pastor Mike Bush, a local lay minister, explained that "the Lord had burdened [his] heart" to ensure that a Ten Commandments monument was displayed on the courthouse lawn and requested the County's approval. Pet. App. 9a, 61a.[1] Bush presented no design plans or other written materials regarding his request, though he described the monument's proposed size and indicated that it would depict the Ten Commandments. Pet. App. 9a, 61a. After hearing Bush's religious plea, all three Board members – Chairman Sam Cole, Henry Few, and Kenny Short – immediately voted in favor of the proposed display. Pet. App. 9a; App. 1014, 1388. There was little discussion.[2] App. 1125; *see also* App.

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[1] In this brief, "App. __" refers to pages in Appellants' Appendix previously filed in the Tenth Circuit on appeal. "Pet. __" and "Pet. App. __" refer to pages in the Petition for Writ of Certiorari and its appendix, respectively.

[2] Though Commissioner Few testified that the Board, at some point later, discussed "history" in relation to the monument, he could not remember whether the discussion occurred during or

1014. At the time, the Commissioners enjoyed unfettered discretion to accept or reject monuments for display for any reason. Pet. App. 60a; App. 1192; *see also* App. 1228-30, 1415 (Board had no written or unwritten policy governing the display of monuments on the courthouse lawn).[3] For example, Respondent James Green was denied permission in the 1990s to erect a rose garden in honor of all Stigler High graduates because the Board of Commissioners did not "want to clutter up the courthouse lawn." Pet. App. 60a.

2. *Designing and Erecting the Monument.* Pursuant to the Board's express directive, Bush began preparations for the monument's construction, raising funds with the help of Protestant religious leaders and local church groups. Pet. App. 62a. Though the district court found that the Board did not specifically review or approve Bush's design or text for the monument, Pet. App. 67a, in authorizing the display, the Commissioners fully anticipated not only that Bush would select a version of the Ten Commandments associated with his Southern Baptist beliefs, but that the engraved text would be

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after the meeting. Neither Few nor any other witness, moreover, could recall any specific comment made or what aspects of "history" were addressed, and the meeting minutes, which were approved by the Board, did not reflect any such discussion. Pet. App. 9a; App. 385-87, 1130-33, 1249.

[3] Five months after this lawsuit commenced, the Board adopted a written policy regarding the display of monuments on county property. App. 1192. The district court determined, however, that the *post hoc* "policy, and its adoption, play[ed] no part in the outcome of this case." Pet. App. 60a n.3.

drawn from their personally favored version of the Bible – the King James edition. App. 402 (Cole testifying, "that's what we looked for, and that's what we got").[4] Consistent with the Board's expectation, Bush selected text paraphrased from Exodus 20 of the King James Bible. Pet. App. 10a, 64a. The monument, which is eight feet tall and three feet wide, states in bold black letters:

> The Ten Commandments
>
> I. Thou shalt have no other gods before me.
>
> II. Thou shalt not make unto thee any graven image.
>
> III. Thou shalt not take the name of the Lord thy God in vain.
>
> IV. Thou shalt remember the Sabbath day and keep it holy.
>
> V. Thou shalt honor thy father and mother.
>
> VI. Thou shalt not kill.
>
> VII. Thou shalt not commit adultry. [sic]
>
> VII. Thou shalt not steal.
>
> IX. Thou shalt not bear false witness against thy neighbor.
>
> X. Thou shalt not covet thy neighbor's house.
>
> Exodus 20

---

[4] Commissioner Cole testified that a different version of the Ten Commandments might have been treated differently. App. 403-04.

Pet. App. 7a. Bush also decided as "an afterthought" to add the text of the Mayflower Compact to the other side, motivated in part by a desire to stave off legal challenges and in part because it expressed the "sovereignty of God." Pet. App. 67a; App. 1022-28.

On November 5, 2004, the monument was permanently installed on the Haskell County Courthouse lawn.[5] Pet. App. 11a. The Commissioners selected its location – the front portion of the courthouse lawn – and marked the spot themselves. App. 412-13, 421. The side of the monument inscribed with the Ten Commandments faces Highway 9, Stigler's busiest thoroughfare, and abuts the walkway that leads to the front courthouse door. Pet. App. 11a, 57a, 63a; App. 940. In addition to the Ten Commandments monument, "a mélange of . . . monuments of various styles, sentiments and construction" are "[s]pread willy-nilly over the front lawn of the courthouse." Pet. App. 58a. Three monuments pay tribute to Haskell County citizens who died in World Wars I and II, the Korean War, and the Vietnam War; a fourth honors the Choctaw Nation; a fifth monument memorializes unmarked graves in Haskell County; and the remaining two monuments consist of stone benches in recognition of the High School Classes of 1954 and 1955. Pet. App.

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[5] The Courthouse sits in Stigler, Haskell County's largest town, and houses the County's primary government offices, including the County Sheriff, District Attorney, Election Board, Assessor, and Judge. The County Commissioners hold their meetings at the courthouse, and citizens visit the building to vote, pay ad valorem taxes, access public records, and view historical records. Pet. App. 6a; App. 434-36, 942-44, 1327-28.

6a. A sidewalk on the lawn also contains individual bricks inscribed with messages from community members. Pet. App. 6a. The various monuments "have no apparent central theme to the amateur eye." Pet. App. 59a.

Approximately eighteen months after the monument was erected and unveiled, and six months after this lawsuit was filed, one additional change was made to the monument: Shortly before trial began and following a conversation with his attorney, Bush decided to have the words "Erected by Citizens of Haskell County" inscribed in small print at the bottom of the monument. Pet. App. 8a-9a; App. 1085, 1100-03.

3. *The Commissioners' Continuing Public Support for the Monument.* After approving the display of the Ten Commandments on the courthouse lawn, the Board continued to offer unqualified public support for the monument. Commissioners Cole and Few attended the monument's dedication, which was "mostly religious in nature." Pet. App. 62a. Though the Commissioners could not recall speaking at the event, according to Bush, who organized the ceremony, both Commissioners addressed the crowd of approximately 100-200 community members representing seventeen local churches.[6] Pet. App. 12a, 62a.

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[6] Petitioners' assertion that "neither of the Commissioners who attended the ceremony spoke," Pet. 14, is not supported by the record. As the district court recognized, though both Commissioners denied speaking at the dedication, Bush testified that he remembered both addressing the crowd. Pet.

In addition, following the dedication ceremony, all of the Commissioners vigorously and publicly defended the monument, often in expressly religious terms. Local newspapers reporting on the controversy published numerous statements by the Commissioners regarding the monument. Pet. App. 12a-13a, 33a-34a; *see* App. 1230. Although the Commissioners subsequently disavowed many of these assertions during the litigation,[7] they admitted in their testimony that they had made the following public statements:

- "God died for me and you, and I'm going to stand up for him. . . . I won't say that we won't take [the monument] down, but it will be after the fight." Pet. App. 33a; App. 1412, 458-59.
- "That's what we're going to live by, that right there. . . . The good Lord died for me. I can stand for him and I'm going to. . . . I'm a

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App. 62a; *see* App. 1098 ("I recall that both of them spoke, said something.").

[7] For example, though various news outlets quoted Commissioner Few as offering an identifiably religious defense of the County's display, at trial, Few did not confirm making the reported statements. *Compare, e.g.*, App. 1402 ("Whatever the law tells us to do, we'll do. We're also Christians and believe in God and the Ten Commandments are our path to heaven."), *with* App. 1173; App. 1400 ("My concern is that if we're not careful, Christians will sit here and not voice our opinions."), *with* App. 1168. Though the Commissioners denied making various remarks such as these when confronted with them during this litigation, they offered no evidence that they had ever disclaimed, sought to correct, objected to, or otherwise took actions to disassociate themselves from these widely reported comments.

Christian and I believe in this. I think it's a benefit to the community." Pet. App. 12a-13a; App. 1393, 455-56.

- "The good Lord, he died for you and me . . . I told him I would stand up for him anytime and I will." App. 456-57.
- "I don't believe in the separation of church and state." App. 1145-46, 1395-97.
- "I'm very, very proud that we have enough backbone to stand up for what we believe in. I believe the Good Lord put this up here, and I don't believe it will ever be taken down." App. 547, 471 (comment made while exiting Commissioners' meeting).

The Commissioners also posed together alongside the monument for myriad photographs. Pet. App. 12a, 53a; *see* App. 1160-61, 1256; App. 936, 960-63, 1015-20, 1331, 1386, 1390. They understood that these pictures were taken because they were elected officials, not merely as random community members, and that their actions would be construed by their constituents as defending the County's Ten Commandments monument. App. 1257-58; *see* App. 1161.

Furthermore, when a poster depicting a young girl praying before an American flag was affixed to the front door of the courthouse to publicize a rally to "Save the Ten Commandments," the Board – which "operates and controls county property," Pet. App. 61a, and thus could have ordered the poster removed to avoid any appearance of official endorsement of the event – took no action, permitting the poster to

remain for nearly three weeks on the front door of the courthouse. *See* Pet. App. 14a; App. 955-57, 1409, 1533-34. Yet, at the same time, when Respondent Green similarly tried to display on the courthouse door his own notice (regarding the placement of a proposed County jail), it was removed within twenty minutes. App. 958-59.

Commissioners Cole and Few also attended the rally, seating themselves above the gathered crowd in the lawn's gazebo with local Protestant pastors and other distinguished guests who had been invited to speak. App. 501, 505, 511, 1314. The rally was a thoroughly religious event that opened and closed with prayers, featured sermon-like speeches,[8] and even included an altar call of sorts, during which Bush, noting that "if one person got saved on account of this monument, this would all be worth it," invited those who had not been saved to meet at the gazebo right after the final prayer. App. 1519, 1525; *see generally* App. 1499-1527 (partial transcript of rally). Speaking at the rally,[9] Commissioner Few

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[8] According to one media report and a transcript of the event, one of the featured pastors appeared to suggest to the crowd that those who disagreed with the monument were wise not to attend because they would be "hanging from the trees." App. 1404, 1514. *But see* App. 509 (Cole denying that any such comment was made at the rally).

[9] One witness who attended the rally testified at trial that, when Few rose to address the crowd, he began by referencing the fact that he was a County Commissioner (and noting that he had, consequently, been advised not to speak). App. 1311. On the same subject, Bush testified that, though he did not recall Few being introduced by the title of Commissioner, "everyone there knew him" and agreed that it was "pretty

proclaimed that anybody seeking to remove the monument would, quite literally, have to go through him first. Pet. App. 14a ("I'll stand up in front of that monument and if you bring a bulldozer up here you'll have to push me down with it.").

4. *Community Reaction to the Monument.* The Board's approval and installation of the Ten Commandments monument has deeply divided the community. Many citizens have cheered the monument as a defense of Christian values and religious beliefs. *See, e.g.*, App. 1404-05. For example, in a letter to the editor regarding the "controversial monument that the commissioners voted to be placed on the courthouse lawn," Commissioner Cole's wife wrote that she "was proud of the stand they took for God and these young people, whose lives have been changed by a personal experience with God." App. 551. *See also, e.g.*, App. 1488 (petition in support of monument signed "Beginning of wisdom is the fear of the Lord").

Almost immediately after the monument was erected, however, some community members also objected to the display, taking offense at what they perceived as the County's endorsement of the majority's religious beliefs. Plaintiff James Green,

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much" understood that he was a Commissioner. App. 1104; *cf.* App. 533-37 (Cole testifying that as a County Commissioner, "[y]ou're on all the time" and agreeing that "you're a county commissioner 24 hours a day, 7 days a week"); App. 1114-15 (Few agreeing that he attends certain public events to keep up his profile as a Commissioner and remain recognizable to constituents in his district).

who encounters the monument on a regular basis, App. 942-44, testified:

> I simply have an objection to the – to the fact that they placed it where I cannot avoid it, and it has certain connotations to me as a person who has been brought up in the church and those connotations do not agree with my – with my theology. . . . My – my fear is that – of the monument being placed and being promoted and defended . . . by my government means that I'm going to be treated and people who do not subscribe to a particular faith that is represented by this monument, and that we're going to be treated differently and more harshly.

App. 951. Elaborating on his theological objection to the government's Decalogue display, Green explained that he believes the Ten Commandments conflict with or undermine the "later teachings of Jesus," to which he subscribes, in that they fail to promote principles stressed by Christ, such as love and forgiveness. App. 946. Green also testified that he believed the Board treated him unfairly in unrelated actions as a result of his differing religious beliefs and opposition to the monument. App. 951-59.

Another Haskell County citizen, Sharon Nichols, similarly explained that she felt discriminated against by the Board after making known her opposition to the monument. Nichols testified that when she called Commissioner Cole to register her complaint about the County's actions, Cole inquired whether she was "a Christian." After Nichols declined to respond, Cole informed her, "'I

don't talk to people who are not Christians' and hung up on [her]."[10] App. 1324-25. Others also registered their objections to the monument. *See, e.g.*, App. 479-82 (Cole testifying that a local Baptist minister had objected to Ten Commandments display).

B. Procedural History

Plaintiffs James Green and the ACLU of Oklahoma (collectively, "Plaintiffs" or "Respondents") filed this action in the U.S. District Court for the Eastern District of Oklahoma on October 6, 2005, against Defendants, the Haskell County Board of Commissioners and its then-Chairman, Sam Cole, acting in his official capacity (collectively, "Defendants," the "County," "Haskell County," or "Petitioners"). Seeking a declaratory judgment and prospective injunctive relief pursuant to 42 U.S.C. §1983, Plaintiffs alleged that Defendants had violated the First and Fourteenth Amendments to the U.S. Constitution by displaying the Ten Commandments monument on the county

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[10] The district court admitted this testimony into evidence, Pet. App. 75a-77a, but gave it minimal weight in resolving the merits, questioning Nichols's credibility because her other testimony was not "dispassionate" enough and determining that the defendants did not have a fair opportunity to rebut it before Cole's death. Pet. App. 75a-77a. Respondents argued in the court of appeals that the district court's ruling constituted plain error: As Nichols gave this information at her deposition on March 2, 2006, the defendants could have attached an affidavit from Cole denying the allegations when they filed their motion for summary judgment two weeks later on March 13, 2006. The Tenth Circuit did not address the issue and did not rely on this fact in its decision.

courthouse lawn. App. 731. After Cole's death on March 18, 2006, the parties substituted Commissioner Henry Few as a named Defendant. App. 732. Thereafter, Commissioner Kenny Short was substituted for Few on March 13, 2007, when Few lost his reelection bid. On April 11, 2006, the district court denied the parties' cross-motions for summary judgment. App. 718-19. The court held a two-day bench trial beginning May 1, 2006.

On August 16, 2006, the district court issued an opinion granting final judgment to Defendants. Pet. App. 56a. The opinion, framed by repeated allusions to Dante's *Divine Comedy*, trivialized Plaintiffs' constitutional claims, labeling the entire dispute a "kerfuffle." Pet. App. 56a. In Cantica II, Canto B of its opinion, the court held that Plaintiff Green had standing to assert his claim, but ruled that the ACLU of Oklahoma had failed to meet the requirements for associational standing because Plaintiffs had not submitted evidence that the interests implicated by the lawsuit were germane to the ACLU of Oklahoma's purpose. Pet. App. 85a. In Cantica III of its opinion, the district court concluded that "Haskell County did not overstep the line demarcating government neutrality towards religion," and thus did not violate the Establishment Clause. Pet. App. 108a.

On September 14, 2006, Plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the Tenth Circuit. App. 925. On June 8, 2009, a panel of the Tenth Circuit unanimously reversed the district court's order. The Court affirmed Plaintiff Green's standing and found it unnecessary to address

whether the ACLU of Oklahoma had standing. Pet. App. 15a. In reaching its conclusion that the County's Ten Commandments monument violated the Establishment Clause, the Tenth Circuit conducted a thorough and detailed analysis of the context and circumstances surrounding the display to determine whether it improperly conveyed a predominantly religious message. *See* Pet. App. 27a-28a. Among other factors, the court of appeals examined "the nature and history of the Haskell County community, the circumstances surrounding the Monument's placement on the courthouse lawn, its precise location on the lawn and its spatial relationship to the other courthouse monuments, and also the Haskell County community's response to the Monument." Pet. App. 30a. Considering the "record as a whole," Pet. App. 45a, the court held that, "under the unique circumstances presented here," the monument "had the impermissible or primary effect of endorsing religion."[11] Pet. App. 5a. The court repeatedly emphasized that its narrow decision did not turn on any one fact, but rather was the

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[11] Formally, the Tenth Circuit characterized this contextual analysis as an application of the second prong of the *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971), with Justice O'Connor's endorsement gloss. Pet. App. 23a. The court, however, "remain[ed] mindful [of Justice Breyer's admonition in *Van Orden v. Perry*, 545 U.S. 677 (2005)] that there is 'no test-related substitute for the exercise of legal judgment.'" Pet. App. 23a. Having concluded that the monument violated the second prong of *Lemon*, the court explained, "[W]e need not (and do not) opine on whether the Board's action satisfies the first *Lemon* prong (i.e., whether the Board's purpose was secular)." Pet. App. 25a-26a.

result of the particular combination of facts in this case. *See* Pet. App. 31a n.10, 37a, 39a, 45a. Indeed, had the Tenth Circuit been presented with a set of facts evincing a context different from the circumstances here, it might have reached a different result in light of its conclusion that "[t]he Ten Commandments have a secular significance that government may acknowledge" and thus can "be constitutionally integrated into a governmental display that highlights [their] secular significance." Pet. App. 27a.

On June 19, 2009, the defendants filed a petition for rehearing *en banc*, which was denied on July 30, 2009. Pet. App. 112a-113a. Two judges wrote dissenting opinions. Pet. App. 113a-144a. On August 17, 2009, the district court entered judgment against Defendants and ordered the County to remove the monument. Judgment, *Green v. Haskell County*, No. 05-406 (E.D. Okla. Aug. 17, 2009). To Respondents' knowledge, as of this filing, the County has not complied with the district court's order and the monument remains on the courthouse lawn.

REASONS FOR DENYING THE PETITION

I. THE TENTH CIRCUIT'S CONTEXTUAL APPROACH IS CONSISTENT WITH THIS COURT'S RELIGIOUS-DISPLAY JURISPRUDENCE AND THE FACT-SENSITIVE STANDARD APPLIED BY THE OTHER CIRCUIT COURTS.

Petitioners mistake the divergent outcomes in several circuit courts' religious-display decisions for a conflict in legal principle. That the Tenth Circuit "became the first circuit court since *Van Orden* [*v. Perry*, 545 U.S. 677 (2005)] to . . . strike down a Ten Commandments monument displayed on government grounds with other historical monoliths," as Petitioners proclaim, Pet. 11, is noteworthy only if one reads *Van Orden* as dispensing with, or radically departing from, the defining feature of modern Establishment Clause jurisprudence: contextual analysis. Whether grounded in the *Lemon*, endorsement, or coercion tests, or a combination of these legal standards, this Court's opinions have repeatedly recognized that, "under the Establishment Clause, detail is key." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 867 (2005); *see also, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose . . ."); *Lee v. Weisman*, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one.").

Context has been particularly central to the Court's analysis of religious displays because, in

those cases, the constitutional inquiry ultimately focuses on whether the government's speech conveys or endorses a predominantly religious message – a determination that is inextricably linked to the specific history, facts, and circumstances surrounding the challenged display. *See McCreary*, 545 U.S. at 868 ("Where the text [of the Ten Commandments] is set out, the insistence of the religious message is hard to avoid in the absence of a context plausibly suggesting a message going beyond an excuse to promote the religious point of view."); *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) ("the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context"); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("the focus of our inquiry must be on the crèche in the context of the Christmas season"); *id.* at 690 ("we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the City's display actually conveyed") (O'Connor, J., concurring). The Tenth Circuit and other courts of appeals have faithfully heeded this fact-sensitive approach. Though Petitioners may not like the result it produced in this case, their disagreement is not grounds for review by this Court.

A. *Van Orden* Did Not Abandon the Court's Contextual Focus.

Van Orden does not support abandoning a contextual approach in favor of a blanket rule that so-called "passive displays of the Ten

Commandments, along with other historical monuments on government property, do not violate the Establishment Clause." Pet. 10. Quite the contrary: In his controlling concurrence,[12] Justice Breyer expressly reaffirmed a contextual standard, noting that "no exact formula can dictate a resolution to such fact-intensive cases." *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring). Justice Breyer's inquiry into the "message that the [monument] here conveys," accordingly, took account of a wide range of contextual factors. *See id.* at 700-05. And although Justice Breyer voted to uphold the Texas display, it follows from his characterization of the monument as a "borderline case," *id.* at 700, that any change in circumstance easily could have prompted the opposite result. *Cf. McCreary*, 545 U.S. at 881 (holding display of Ten Commandments unconstitutional in same-day companion opinion).

While more circumscribed than Justice Breyer's expansive fact-sensitive analysis, the *Van Orden* plurality likewise used a contextual approach, explaining, "our analysis is driven by the nature of the monument and by our Nation's history." *Van Orden*, 545 U.S. at 686 (plurality opinion). In upholding the monument, the plurality took note of the monument's physical location (contrasting the Capitol grounds with a public-school classroom); the reaction of those confronted with the monument (pointing out that Van Orden had "apparently

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[12] Because *Van Orden* was decided by a plurality, the separate, narrower concurring opinion of Justice Breyer, who supplied the decisive fifth vote, controls. *See Marks v. United States*, 430 U.S. 188 (1977).

walked by the monument for a number of years before bringing this lawsuit"); the monument's fit within the State's longstanding and well-established theme for the Capitol grounds (citing the State's past treatment of the grounds "as representing the several strands in the State's political and legal history"); and the purpose with which the monument was erected (concluding that "it is clear from the record that there is no evidence of such a [religious] purpose in this case"). *See id.* at 691-92 & n.11.

Van Orden thus left the prevailing constitutional landscape intact. It surely did not, as Petitioners appear to suggest, authorize the courts of appeals to dispense with the fact-sensitive and nuanced analysis this Court has long applied to religious displays, in favor of a categorical imperative sanctioning any display that may share some similarities with the Texas Ten Commandments monument.

B. The Differing Results in the Circuit Courts' Religious-Display Cases Stem From Their Factual Differences, Not a Split in Legal Principle.

Consistent with *Van Orden* and this Court's steadfast emphasis on context, the Tenth Circuit conducted a careful and balanced analysis of the particular facts and circumstances surrounding the Haskell County monument to determine whether it conveys a religious message, repeatedly "underscoring the proposition that '[c]ontext carries much weight in the Establishment Clause calculus.'" Pet. App. 48a (quoting *Weinbaum v. City of Las*

Cruces, 541 F.3d 1017, 1033 (10th Cir. 2008)).[13] Each of the other courts of appeals to consider a Ten Commandments display since *Van Orden* likewise has adopted a contextual approach, considering a range of factors to determine whether the challenged monument improperly conveyed a religious message. *See ACLU of Ky. v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005) ("Context is crucial . . . ."); *id.* at 639 ("Although treating the subject matter categorically would make our review eminently simpler, we are called upon to examine Mercer County's actions in light of context."); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776 (8th Cir. 2005) (en banc) ("[C]onsideration must be given to the context in which the Ten Commandments' text is used."); *Card v. City of Everett*, 520 F.3d 1009, 1019 (9th Cir. 2008) (noting that Justice Breyer examined "'the message that the text . . . conveys . . . [in] the context of the display'" and "[v]iewing Justice Breyer's factual analysis side by side with the factual circumstances here") (quoting *Van Orden*, 545 U.S. at 700-01) (Breyer, J., concurring).

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[13] *See also, e.g.*, Pet. App. 26a ("Establishment Clause cases are predominantly fact-driven . . . .") (internal quotation marks and citation omitted); *id.* at 30a ("Consistent with the fact-intensive nature of this effect inquiry, the Supreme Court has advised that, in Establishment Clause cases, the inquiry calls for line drawing; no fixed, per se rule can be framed.") (internal quotation marks and citation omitted); *id.* at 31a n.10 ("the analysis must undertake a significant inquiry into the surrounding circumstances").

In light of the contextual approach taken by both this Court and the courts of appeals, it is hardly remarkable or unexpected that the Tenth Circuit in this case held the Haskell County display unconstitutional, while the Sixth, Eighth, and Ninth Circuits approved the specific Ten Commandments monuments before them. Those displays were defined by a particular combination of constitutionally significant and operative facts not shared by the County's monument, and *vice versa*. Unlike the Haskell County monument, for example, both the *Card* and *Plattsmouth* Decalogues were (1) donated by a civic group to achieve a primarily secular goal; (2) engraved with a nonsectarian version of the Ten Commandments, as well as a prominent inscription indicating that they were gifts to the city; (3) accepted and displayed by the city without clear evidence of an expressly religious aim; and (4) displayed for decades without complaint. *Compare Card*, 520 F.3d at 1010-13, 1020-22, *with Plattsmouth*, 419 F.3d at 773-74; *cf. infra* pp. 26-31 (identifying numerous factual distinctions between the Haskell County and *Van Orden* displays). Similarly, the context and circumstances surrounding the display of the Ten Commandments upheld by the Sixth Circuit in *Mercer* are readily distinguishable from those associated with Petitioners' monument.[14] The copy of the Ten

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[14] Petitioners' claim that the court of appeals disregarded "'the role religion has played in our governmental institutions'" and declared it generally unacceptable "'for a state to include religious references, even in the form of sacred texts, in honoring American legal traditions,'" thereby creating a "[c]onflict with the Sixth Circuit," *see* Pet. 23-24 (quoting

Commandments posted in the Mercer County Courthouse was part of a unified "Foundations of American Law and Government" exhibit, which was maintained by the County "to recognize American legal traditions," without any additional indication of an express religious message. *See Mercer*, 423 F.3d at 631-32, 637-38.

Nor is it surprising that the courts of appeals upheld the religious displays addressed in the pre-*McCreary/Van Orden* cases relied on by Petitioners, *Books v. Elkhart County* ("*Books II*"), 401 F.3d 857 (7th Cir. 2005), and *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997). These courts also applied a contextual analysis to the challenged displays, reaching conclusions that turned entirely on the particular facts of those cases. *See Books II*, 401 F.3d at 865 (court must examine "'the particular display at issue, considered in its overall context'") (quoting *Books v. City of Elkhart* ("*Books I*"), 235 F.3d 292, 303 (7th Cir. 2000)); *Elewski*, 123 F.3d at 52 ("Establishment Clause case law applies a highly fact-specific test to government-sponsored crèches[.]"). As in *Mercer*, the *Books II* Ten Commandments display constituted only one element of a thematically unified "Foundations of

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Mercer, 423 F.3d at 639-40), is simply not supported by the Tenth Circuit's opinion. On the contrary, refusing to adopt a constitutional presumption against Ten Commandments displays, the court of appeals expressly recognized that "[t]he Ten Commandments have a secular significance that government may acknowledge," and that such displays can, depending on their context, broadcast a permissible secular message. Pet. App. 27a-28a.

American Law and Government" exhibit, which was posted by the county without any identifiable religious aim. *See* 401 F.3d at 864-68. Similarly, in considering the crèche challenged in *Elewski*, the Second Circuit viewed the city's simultaneous display of artificial greenery, wreaths, colored lights, decorated trees, reindeer, snowman, wire bells, and a menorah as "part of the relevant context." 123 F.3d at 54. Though spread farther apart than the monuments on the Haskell County lawn, these elements all fit within a very specific, identifiable, and unified theme: a holiday celebration. *See id.* at 54-55. By contrast, while acknowledging that "a reasonable observer would have noticed that the [Haskell County] Monument was one of numerous other monuments and displays on the courthouse lawn," which "would typically weigh against a finding of endorsement," the Tenth Circuit could not ignore the fact that the other monuments here lacked a "unifying, cohesive secular theme." Pet. App. 39a, 42a n.16.

As the cases relied on by Petitioners demonstrate, differing outcomes do not always equate to a conflict in legal principle, especially where, as here, the outcomes depend so heavily on the particular facts and context of each challenged action. Indeed, were it otherwise, many of the appellate decisions cited by Petitioners would present *intra*-circuit splits, as the same courts of appeals have held other governmental religious displays unconstitutional. *See, e.g.*, *Cooper v. USPS*, 577 F.3d 479 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3322 (U.S. Nov. 17, 2009) (No. 09-608);

ACLU of Ohio Found. v. Ashbrook, 375 F. 3d 484 (6th Cir. 2004); *Books I*, 235 F.3d 292. At its core, the legal standard derived from this Court's opinions and applied by the courts of appeals is no different now than it was before *Van Orden*. The confusion or conflict, if any, rests more with the circuit courts' disagreement over the appropriate nomenclature for this contextual analysis than the actual substance of the analytical process itself.

C. Petitioners' Disagreement With the Result of the Tenth Circuit's Contextual Analysis Does Not Warrant Review by This Court.

As their proposed "substantial similarities" analysis illustrates, even Petitioners ultimately do not take issue with the Tenth Circuit's contextual approach; indeed, in suggesting that the *Van Orden* and Haskell County monuments are "virtually identical," they explicitly compare the contextual circumstances surrounding both displays.[15] Pet. 13. Petitioners' objection is, instead, one of application – or rather, misapplication. Put simply, Petitioners

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[15] Petitioners compare a variety of contextual factors, including: who initiated, financed, and determined the content and location of the displays; the actual text of the monument; the physical setting of the monument and surrounding displays; the purpose of the donors; and officials' attendance at the monument's dedication ceremony. *See* Pet. 13-14. Though this cherry-picked list of purportedly "substantial similarities" between the two monuments tells only half the story and elides a catalogue of undisputed facts that speak to the substantial *dis*similarities between the two cases, *see infra* pp. 26-31, it evinces Petitioners' acceptance of a context-based analysis.

contend that the court of appeals weighed the facts incorrectly. They argue, in essence, that the court gave too much weight to some contextual factors and not enough weight to others, thereby reaching the wrong result. Were it conducting the contextual analysis, the County clearly would place great emphasis on the "operative facts" listed in its petition, Pet. 13-14, while according little significance to a litany of other factors that (1) distinguish this case from *Van Orden* and the circuit courts' subsequent religious-display decisions, and (2) counsel in favor of a determination that the County's display conveys a religious message. *See* Pet. 13-14. Petitioners' alleged "misapplication of a properly stated rule of law," however, is generally not an adequate basis for review by this Court,[16] especially where, as here, it is clear that the court of appeals reached the correct result.

II. THE COURT OF APPEALS REACHED THE CORRECT RESULT IN THIS CASE.

The myriad facts distinguishing the Haskell County monument from the displays upheld in *Van Orden*, *Card*, *Plattsmouth*, *Mercer*, *Books II*, and *Elewski* did not escape the Tenth Circuit's attention. Conducting a balanced and nuanced review of the monument's context and carefully weighing the facts

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[16] *See* Sup. Ct. R. 10 (2007) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

on both sides,[17] the court issued a narrow decision that turned on the particular combination of "unique circumstances" in this case. Pet. App. 5a. No one factor considered by the court was determinative; rather, the court of appeals reached its conclusion based on the "record as a whole." Pet. 45(a); *see, e.g.*, Pet. App. 31a n. 10 (noting that while "[t]he reasonable observer would be very unlikely . . . to give the Board's agreement [with Bush] determinative weight . . . [he or she] could not negate this circumstance as one in the *totality of circumstances* that was consistent with a conclusion that the Board's conduct had the effect of endorsing religion") (emphasis added); Pet. App. 37a ("We underscore that the reasonable observer's impression

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[17] Though the court of appeals disagreed with the legal conclusions drawn by the district court from its factual findings, the Tenth Circuit deferred to the factual findings themselves. *See, e.g.*, Pet. App. 6a n.2 ("Our recitation of the facts relies largely on the district court's factual findings in its opinion issued after the bench trial."). In other words, the court of appeals left undisturbed all of the district court's factual findings regarding, for example, the physical description of the courthouse lawn and the monument itself, the events leading to the County's adoption and erection of the display, and the content of the County Commissioners' public statements in defense of the monument. Whether those facts collectively amount to an Establishment Clause violation, however, is fundamentally a legal question that the court of appeals properly reviewed *de novo*. *Cf. McCreary*, 545 U.S. at 867 (district court's legal rulings reviewed *de novo*). Because neither Petitioners nor the court of appeals takes issue with any of the district court's factual findings, the standard of review applied to those findings, even if the subject of a circuit split, as Petitioners claim, see Pet. 28-29, has no bearing on the outcome here.

of government endorsement would not be based upon the commissioners' statements alone."); Pet. App. 37a n. 12 (noting that inferences drawn from Board's failure to offer secular reason for display "would not be determinative by any means, but it would be one factor, among many others, that the reasonable observer could consider in reaching a conclusion on the endorsement issue"); Pet. App. 39a ("We recognize that certain evidence weighs against a finding of endorsement. However, *surveying the entire record*, we cannot conclude that this evidence sufficiently blunts the message of endorsement that we find to be present to alter the result.") (emphasis added).

Given this Court's ongoing, consistent embrace of context as a measure of constitutionality, even if the Tenth Circuit had viewed this case solely through the lens of *Van Orden*, as Petitioners demand, Haskell County's Ten Commandments monument still would not have passed constitutional muster because there are significant, material distinctions between this display and the monument in *Van Orden*. Unlike in *Van Orden*, for example, the monument donor in Haskell County was unequivocal in stating his "unalloyed religious motivation"; Board members appeared immediately to affirm this singular religious purpose; and until litigation commenced, Board members neither gave any indication, collectively or individually, that they intended for the display to serve a secular purpose, nor otherwise distanced themselves from the religious origin of the monument. *Compare* Pet. App. 31a n. 10; *supra* pp. 1-8, *with Van Orden*, 545 U.S. at

701 (Breyer, J., concurring) (explaining that the Fraternal Order of Eagles is a "civic (and primarily secular) organization" that "sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency"); *id.* (citing official resolution recognizing secular purpose).[18] Quite the opposite: Haskell County Board members publicly declared their support for the monument in expressly religious terms and posed together beside the monument, "giv[ing] the impression of the Board's united endorsement."[19] *See* Pet. App. 33a-35a; *supra*

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[18] There is no evidence that this resolution expressed approval of the organization's religious aspects, as Petitioners imply. *See* Pet. 13-14; *Van Orden v. Perry*, No. A-01-CA-833-H, 2002 WL 32737462, at *4 (W.D. Tex. 2002) (setting forth text of resolution), *aff'd*, 351 F.3d 173 (5th Cir. 2003), *aff'd*, 545 U.S. 677 (2005).

[19] The Court properly considered these statements and photos as part of its contextual analysis. Petitioners' reliance on *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989), in arguing to the contrary, is misplaced. That opinion is an outlier decision from the Eighth Circuit that predates this Court's decisions in *Lee*, *Santa Fe*, *McCreary*, and *Van Orden*, which all expressly reaffirmed the import of history and context in Establishment Clause cases. *See supra* pp. 15-18. Moreover, this Court has repeatedly factored officials' public statements, along with other publicly available information, into its contextual analysis. *See, e.g.*, *McCreary*, 545 U.S. at 851 (citing statements made by a county official and his pastor at a religious dedication ceremony); *Edwards v. Aguillard*, 482 U.S. 578, 587, 590-93 (1987) (treating legislators' statements as compelling evidence that challenged statutes had been enacted for improper purpose); *Epperson v. Arkansas*, 393 U.S. 97, 107-09 & n.16 (1968) (pointing to letters from the public and advertisements used to secure adoption of an Arkansas anti-evolution statute to highlight its religious aims). In considering these facts, the

pp. 5-9. In addition, unlike in *Van Orden*, the dedication ceremony attended by Board members was "mostly religious," as was the Save the Commandments rally at which Commissioner Few declared that he would lie down in front of a bulldozer to protect the monument. *Compare supra* pp. 5, 7-9, *with Van Orden v. Perry*, 351 F.3d 173,179-80 (5th Cir. 2003) ("There is no evidence of any religious invocations or that any minister, rabbi, or priest were even present."), *aff'd*, 545 U.S. 677 (2005).

Furthermore, as even the district court recognized, the courthouse lawn contains a "mélange" of monuments that are "spread willy-nilly over the front lawn of the Courthouse" and "have no apparent central theme to the amateur eye." Pet. App. 58a-59a. This haphazard physical arrangement supported the Tenth Circuit's conclusion that the

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court of appeals did not impose a heightened Establishment Clause standard on small-town government officials. *See* Pet. 26-27. Rather, taking into account Petitioners' own admission that Board members act as county officials "24 hours a day, 7 days a week," *supra* note 9; the content and nature of the Commissioners' statements; and the fact that the Commissioners made no attempt to distinguish between their beliefs and those of the Board, the court properly concluded that a reasonable observer would be more likely to perceive religious endorsement under these particular circumstances. In any event, the Tenth Circuit did not consider these statements to be determinative of its conclusion. *See* Pet. App. 37a ("We underscore that the reasonable observer's impression of government endorsement would not be based upon the commissioners' statements alone. The statements would be just part of the history and context of which the reasonable observer would be cognizant.").

monuments have "less of a unifying cohesive secular theme" than those in *Van Orden* such that "the Haskell County courthouse display was at least to some appreciable degree less likely than the *Van Orden* display to bring to the fore the secular historical and moral messages of the Ten Commandments." *See* Pet. App. 42a n. 16. Additionally, in contrast to the *Van Orden* display, the Haskell County monument did not include a statement indicating it was donated to the County when it was erected – a detail omitted in Petitioners' comparison of the two cases. *See* Pet. 13. The language was added only "*after* litigation had begun and on the eve of trial." *Compare* Pet. App. 48a, *with Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring) (noting that monument "prominently acknowledge[d] that the Eagles donated the display, . . . thereby further distanc[ing] the State itself from the religious aspect of the Commandments' message").

Finally, unlike in *Van Orden*, the Haskell County monument incited discord in the community almost immediately after it was erected. While the Texas monument stood for forty years without challenge, the County's display prompted litigation within months of its unveiling. *Compare Van Orden*, 545 U.S. at 702 (Breyer, J., concurring), *with supra* pp. 9-11. This fact is significant under *Van Orden* not because the age of a monument or the length of time it goes unchallenged are dispositive, in and of themselves,[20] but because these factors serve as

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[20] The court of appeals did not make this factor "determinative," as Petitioners claim. Pet. 16. Rather, the court was describing

barometers for the divisiveness of the display. This, in turn, provides insight into what message the community has "understood the monument" to convey. *Van Orden*, 545 U.S. at 702-03 (Breyer, J., concurring). Here, the Commissioners, along with many other members of the Haskell County community, have vigorously defended the monument in staunchly religious terms, understanding it to be an affirmation of the community's faith and the majority religious beliefs. *See supra* pp. 6-9.

As a review of the full panoply of facts reveals, this case can hardly be characterized as "virtually identical" to *Van Orden*. *See* Pet. 13. If the Texas Ten Commandments monument straddled the "borderline" of constitutional boundaries, as Justice Breyer concluded in *Van Orden*, 545 U.S. at 700

Justice Breyer's treatment of that fact in *Van Orden*. Pet. App. 44a. In the next paragraph, where the court of appeals discussed the age of the Haskell County monument, the court clarified that it was "viewing the record as a whole." Pet. App. 45a. Moreover, this factor was "determinative" in *Van Orden* only in the sense that the lack of divisiveness there, when added to the other contextual factors highlighting the monument's secular message and downplaying its religious meaning, cemented Justice Breyer's conclusion that the display was permissible. *Van Orden*, 545 U.S. at 702-04. Justice Breyer did not, as Petitioners suggest, hold that the passage of time or age of a monument can insulate all Establishment Clause violations, however egregious, from review, nor would his analysis render successful every possible challenge to recent government activity. *See* Pet. 16-17. Instead, his discussion simply highlights that the likely "divisive" nature of a "more contemporary state effort to focus attention upon a religious text" should be factored into the contextual analysis. *Van Orden*, 545 U.S. at 703 (Breyer, J., concurring).

(Breyer, J , concurring), there can be little question that the Haskell County display steps over that line,[21] violating the Establishment Clause and rendering any dispute over the precise governing analytical framework irrelevant to the outcome of this case Accordingly, because resolution of the circuit split alleged by Petitioners, even if it existed, would have no bearing on the ultimate result here, this Court should deny *certiorari* and wait until presented with a case in which resolution of the conflict below would be determinative. *See* Eugene Gressman, et al., *Supreme Court Practice* 248 (9th ed. 2007) (where the "resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied") (citing *Sommerville v. United States*, 376 U S. 909 (1964))

III. THE TENTH CIRCUIT'S STANDING DETERMINATION IS UNEXCEPTIONAL AND DOES NOT WARRANT REVIEW BY THIS COURT.

Both the district court and the court of appeals agreed that Respondent Green has standing to bring this case. As the district court held, Green "disagrees theologically with the Monument, and is confronted with the Monument when compelled to go to the

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[21] This conclusion is even more evident when a number of additional relevant factors not even considered by the court of appeals are added to the contextual analysis, including the numerous statements attributed to the Commissioners in the media, later denied in litigation, *see supra* p 6 & n 7, and Commissioner Cole's discriminatory treatment of Susan Nichols, *see supra* pp 10-11

courthouse for business." Pet. App. 84a. That is all he is required to show. Green does not, contrary to the County's assertions, object primarily to the Commissioners' statements regarding the monument *See* Pet 30. Rather, as he testified and both the district court and the Tenth Circuit acknowledged:

> Green is offended by the monument because he believes its text is presented as a mandate and is thus an endorsement by the government of religious matters He objects to the text of the Ten Commandments etched into the monument because he subscribes to the later teachings of Jesus. . Green also believes that his opposition has caused Commissioner Sam Cole to destroy or ignore Green's open records request, his request for hearing impairment assistance, and his petition regarding the location of the new county jail.

Pet App 69a; *accord* Pet App 13a

Unable to support their argument that Green has "not proved sufficient facts to establish standing," Pet. 30, Petitioners instead ask this Court to rewrite the basic, time-honored principle that observers who are personally and directly confronted and affected by unwelcome governmental displays of religious symbols have standing to challenge those displays That principle has never been rejected in any Establishment Clause decision involving religious displays, either in this Court or any federal

court of appeals.[22] Accordingly, the issue of Green's standing does not warrant this Court's review.

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[22] *See, e.g.*, *McCreary*, 545 U.S. at 844-80; *Van Orden*, 545 U.S. at 677-692 (plurality opinion) & 698-706 (Breyer, J., concurring); *Weinbaum*, 541 F.3d at 1028-29; *Vasquez v. L.A. County*, 487 F.3d 1246, 1249-53 (9th Cir. 2007); *Modrovich v. Allegheny County*, 385 F.3d 397, 399-415 (3d Cir. 2004); *Plattsmouth*, 419 F.3d at 775 n.4; *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002); *Books I*, 235 F.3d at 299-301; *Suhre v. Haywood County*, 131 F.3d 1083, 1090 (4th Cir. 1997); *Murray v. City of Austin*, 947 F.2d 147, 150-52 (5th Cir. 1991); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1027 (2d Cir. 1989); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107-08 (11th Cir. 1983).

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

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No. 09-531

In The
Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, ET AL.,
Petitioners,

v.

JAMES W. GREEN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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ARGUMENT

Nothing in respondent's misguided effort to divine a unifying theory of the Establishment Clause provides an answer to the realities that make this case a compelling candidate for this Court's plenary review. The decision below is the first (and only) post-*Van Orden* decision by a federal court of appeals to strike down a passive Ten Commandments display and is in direct conflict with decisions of several circuits. Moreover, the decision below conflicts with this Court's decision in *Van Orden* and the fundamental principle that like cases should be decided alike. This case presents an excellent vehicle for the Court to resolve these conflicts and address the confusion that has been sown in the lower courts by the decisions in *Van Orden* and *McCreary*, thus bringing coherence to this important area of Establishment Clause jurisprudence. It also provides the Court with an opportunity to address one of the causes of this confusion—relaxed standing requirements.

I. "CONTEXT" FAILS TO RECONCILE THE TENTH CIRCUIT'S CONFLICT WITH THIS COURT'S RULING IN *VAN ORDEN* AND DECISIONS OF OTHER CIRCUITS.

Green tries to reconcile the conflicts between the Tenth Circuit's decision and decisions by this Court and sister circuits with a newly fabricated test that explains all Establishment Clause jurisprudence. Unsurprisingly, this attempt at a Grand Unified Theory—which relies on the notion that all Establishment Clause legal tests are different only in name—fails.

A. There is no unified theory of Establishment Clause jurisprudence.

The unified theory of Establishment Clause jurisprudence that Green proposes exists neither in theory nor in practice. While "[i]t is always appealing to look for a single test, a Grand Unified Theory" that would resolve all cases arising under the Establishment Clause, such a test has been rejected for "do[ing] more harm than good." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring). This is because "the same constitutional principle may operate very differently in different contexts." *Id.* Thus, a single test for all Establishment Clause cases would have either been too narrow to address the wide variety of issues that exist, or "so vague as to be useless." *Id.* Context is not the test itself. It determines what test to use, and how that test might be applied.

The Tenth Circuit did not use a context test in this case. It expressly relied upon the *Lemon* test to reach its holding. App. 5a, 48a. The court found that Tenth Circuit precedent obligated it to follow *Lemon*. *Id.* at 23a. But in *Van Orden v. Perry*, this Court rejected using the *Lemon* test to determine the constitutionality of a privately initiated and donated monument of the Ten Commandments displayed with other historical monuments on government property. 545 U.S. 677, 686 (2005) (plurality opinion); *see also id.* at 703 (Breyer, J., concurring). The Eighth and Ninth Circuits have followed *Van Orden* in rejecting *Lemon* in such cases. *Card v. Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008); *ACLU Nebraska Found. v. City of*

Plattsmouth, Nebraska, 419 F.3d 772, 777 (8th Cir. 2005) (*en banc*).[1]

Green tries to smooth over this conflict by saying that all courts to consider this issue have really used his context test but have just been quibbling over "the appropriate nomenclature" for that test. Resp. Brf. at 23, 13 n. 11. This would certainly be news to the *Van Orden* plurality, which found that "the *Lemon* test...[is] not useful in dealing with the sort of passive monuments" Texas had placed on its government grounds. 545 U.S. at 686. And Green's argument was rejected by the Ninth Circuit in *Card* when, as it was applying the *Van Orden* analysis to allow a passive Ten Commandments monument to remain standing, it noted that application of the *Lemon* test to such cases would likely always result in a finding of unconstitutionality. 520 F.3d at 1015-16. Thus, not only is there a significant difference in analyzing a case under *Lemon* as opposed to *Van Orden*, but that difference has been recognized as outcome-determinative. Green's attempt at jurisprudential syncretism fails outright.

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[1] Indeed, the trend since *Van Orden* and *McCreary* has been uniformly to uphold Ten Commandments monuments and displays. Only the Tenth Circuit's decision below fails to fall in step with this case law cadence. For example, the most recent case, *ACLU of Kentucky, et al. v. Grayson County, Kentucky*, No. 08-5548, __F.3d__, 2010 WL 114361 (6th Cir. Jan. 14, 2010), upheld a display identical to the one that this Court considered in *McCreary*. *Grayson* is also notable because it wrestles with the continued confusion in the case law and it re-emphasizes the conflict between the Sixth Circuit's reasonable observer and the Tenth Circuit's.

B. Context is not a means of analysis but rather the thing being analyzed.

Context is important. It informs which test should be used to analyze a situation and then informs how the test applies in the situation. *Kiryas Joel*, 512 U.S. at 720 ("There are different categories of Establishment Clause cases, which may call for different approaches.") (O'Connor, J., concurring). Accordingly, this Court found in *Van Orden* that, in the context of a privately initiated and funded passive religious monument displayed with other historical monuments on government grounds, the proper test is not *Lemon*'s analysis of official purpose, effect or entanglement, but rather "the nature of the monument and...our Nation's history." 545 U.S. at 686. And once the test is chosen, then certain contextual matters (like *Van Orden*'s emphasis on national history) are relevant, while other ones (like *Lemon*'s questions regarding official purpose) are not.

But context is not the test itself because context cannot tell judges or government officials what and how contextual matters are relevant. Tests do that. Tests provide analytical principles to consistently evaluate the changing factual contexts that cases present. Green's "context test," then, would not provide a guide for judicial or governmental decisions.

In fact, Green's new test is not a test at all. Rather, it is a mutated resurrection of the "I know it when I see it" standard—an unworkable rule that was abandoned in the context of obscenity and should not

be used to analyze the Establishment Clause.[2] If Green's infinitely elastic "context" approach is adopted, both judges and government officials would be left to guess at which facts should be analyzed and how they should be weighed, a decidedly unreliable approach that would yield arbitrary and conflicting results—and would leave the case law "in Establishment Clause Purgatory." *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005).

C. Green fails to distinguish cases from other circuits that conflict with the Tenth Circuit's use of the reasonable observer.

Not only is there no unified theory of Establishment Clause jurisprudence, the Tenth Circuit's decision suggests that there is no unified way to apply *Lemon*. For instance, unlike *Lemon*'s "reasonable observers" employed in the Second, Sixth, Seventh, and Eighth Circuits, those in the Tenth Circuit are allowed to consider erroneous and incomplete information to determine whether a monument sends a message endorsing religion. Indeed, the Tenth Circuit's reasonable observer unreasonably thought that unofficial statements and appearances were official, even when—as a matter of unquestioned fact—they were not. App. 36a (n. 11).

Further, the Tenth Circuit's consideration of the private Monument donor's intent and the statement of a single commissioner in his concededly private

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[2] *Miller v. California*, 413 U.S. 15, 24 (1973) replaced Justice Stewart's famous definition of obscenity, stated in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

capacity conflicts with other cases' application of the reasonable observer test. This Court has held that the only relevant inquiry for the reasonable observer in searching for an impermissible endorsement of religion is in the "text, legislative history, and implementation of the statute, or comparable official act." *McCreary County v. ACLU*, 545 U.S. 844, 862 (2005) (quotation marks omitted). The Eighth Circuit further found that public officials are not required to abandon their religious beliefs upon entering public life and, for purposes of Establishment Clause analysis, the personal opinions and positions they take on religious matters cannot properly be imputed to the government. *Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989);[3] *see also McGowan v. Maryland*, 366 U.S. 420, 431 (1961). *Card* also "recognized the importance of differentiating between the [private donor's religious purpose] and the [government's] goals in accepting the gift." 520 F.3d at 1019.

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[3] Green does not deny the square conflict between the decision below and *Clayton*, but instead characterizes *Clayton* as an "outlier" because it was decided prior to cases like *McCreary* and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), which "expressly reaffirmed the import of history and context in Establishment Clause cases." Resp. Brief at 27 n. 19. But this Court had considered history and context in previous cases, such as *Allegheny County v. ACLU*, 492 U.S. 573, 595 (1989), and *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987)—both of which were decided before (and cited by) *Clayton*. *Clayton*, 884 F.2d at 379. And neither *McCreary* nor *Santa Fe* even addressed facts regarding personal religious views of government officials articulated in a personal capacity, much less held that they were relevant for Establishment Clause purposes, so they do not affect *Clayton*'s analysis on that point.

Additionally, every case Green cites for the proposition that private statements by public officials can be evaluated under *Lemon* involves statements made by public officials while performing their duties. Resp. Brf. at 27 n. 19. The Judge-Executive in *McCreary* was acting in his official capacity at the dedication ceremony that he "presided over." 545 U.S. at 851. The official speech of the chief judge at the unveiling ceremony was evidence regarding secular purpose (and primary effect) in *Glassroth v. Moore*, 335 F.3d 1282, 1296-97 (11th Cir. 2003). In *Edwards v. Aguillard*, 482 U.S. 578, 591-92 n. 13 (1987), this Court considered legislators' statements that were in the "official legislative history" when assessing whether a state statute regarding creationism had a secular purpose. And *Epperson v. Arkansas*, 393 U.S. 97 (1968), did not even address statements made by legislators.[4]

Thus, there are significant case law conflicts between the Tenth Circuit's decision and the decisions of this Court and sister circuits. Given the substantial similarity between *Van Orden* and the facts of this case, discussed in more detail below, resolution of these conflicts by determining that *Van Orden* governs religious monument displays would result in a finding for the Commissioners.

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[4] *Epperson*, decided three years before *Lemon*, determined that an anti-evolution statute adopted by Arkansas 40 years earlier had a religious purpose based on advertisements and letters to the editor, *id.* at 108 n.16—neither of which were relied upon by the Tenth Circuit in this case as evidence of endorsement.

II. LIKE CASES SHOULD BE DECIDED ALIKE, AND THIS CASE IS LIKE *VAN ORDEN*.

Save the age of the monument, all the relevant facts weighed in *Van Orden* are similar in the case at bar. Pet. at 13-14.[5] And while Green tries to create factual grounds for distinguishing *Van Orden*, he ultimately admits that he does not "take[] issue with any of the district court's factual findings." Resp. Brf. at 25 n. 17.[6] With that concession in mind, here are the relevant findings of the district court:

- Green failed to prove that any of the quotations he attributes to the Commissioners were official statements or a part of the official history of the Monument. App. 62a, 71a, 93a.[7]

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[5] Green effectively concedes that *McCreary* is distinguishable from this case by entirely failing to address the Commissioners' argument on that point. Pet. at 17.

[6] Green fails to address the circuit split over whether the correct standard of review for factual matters in Establishment Clause cases where there has been a trial is *de novo* or clear error. Pet. 28-29.

[7] The district court also found that the accounts offered by Green's witnesses of certain statements by the Commissioners lacked credibility. App. 77a (finding Nichols' inflammatory allegations against Commissioner Cole, Resp. Brf. at 10, "are likely apocryphal," and the account of Commissioner Few's rally statements, Resp. Brf. at 8, too questionable to be accorded "much weight"). And despite Green's attacks on the Commissioners' truthfulness on appeal, *see, e.g.*, Resp. Brf. at 6 n. 7, the district court found them to be "highly credible witnesses." App. 75a.

- None of the Commissioners ever made religiously-themed comments or even attended Monument-related events in their official capacity. App. 71a, 91a, 93a, 99a.

- The "Board never approved, or even reviewed, Bush's design of the Monument or the version of the Commandments that appears on it. Indeed...none of the Commissioners knew that different versions of the Ten Commandments might exist at the time they voted to approve the Monument." App. 67a.

- The County did not endorse the message of any of the monuments erected on the courthouse grounds, including the Ten Commandments Monument. App. 101a.

- The Commissioners did not make any comments regarding the religious value of the Monument when Mr. Bush requested to erect it, though they did discuss its historical significance. App. 62a, 78a.

- "[O]ne of the purposes of the Commissioners in approving Bush's request was to protect the public from potential liability should his request have been denied." App. 79a.

- The Monument was entirely non-controversial, attracted no real public attention until Green filed suit, and it was Green's suit—not the Monument—which incited discord. App. 68a, 70a-71a, 94a-95a.

- "[A] reasonable observer would see an aesthetic flow" in the courthouse monuments because they "clearly represent what Haskell County citizens consider the noteworthy events and sentiments of their country, their state, and their nation." App. 104a.

Green's attempts to distinguish *Van Orden* are simply inaccurate. First, he argues that, unlike the instant case, there was no religious purpose for the *Van Orden* monument's erection. Resp. Brf. at 18 and 26. But the *Van Orden* monument was explicitly donated with a goal to "inspire all who pause to view [it], with a renewed respect for the law of God." 545 U.S. at 707 (Stevens, J., dissenting) (citation and quotation marks removed).[8] Similarly, the Ninth Circuit's *Card* decision specifically acknowledged the religious purpose of the private donating organization, but did not believe that changed the *Van Orden* analysis. 520 F.3d at 1020.

Green further tries to distinguish *Van Orden* by saying that it dealt with a monument that was incorporated into a unified theme, whereas Haskell County had no theme. But not all the justices who viewed the *Van Orden* display were convinced of a common theme, 545 U.S. at 743 (stating "there is no common denominator" to unify the *Van Orden* display) (Souter, J., dissenting), and many of the judges—including the district court—who viewed the

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[8] Curiously, Green tries to deflect this point by arguing that there was no evidence that Texas officially adopted the donor's religious purpose. Resp. Brf. at 27 n. 18. But there is no evidence that Haskell County officially adopted Mr. Bush's religious purpose, either.

Haskell County display saw a sufficiently unified theme. App. 104a (district court), App. 118a (Judge Kelly's dissenting opinion, joined by Judges Tacha and Tymkovich), 139a (Judge Gorsuch's dissenting opinion, joined by Judges Kelly, Tacha, and Tymkovich).

Haskell County's Monument is no more an endorsement of religion than the one upheld in *Van Orden*, and razing it[9] would "exhibit a hostility toward religion that has no place in our Establishment Clause traditions." 545 U.S. at 704. Government entities like Haskell County and the states that joined in the Indiana Attorney General's amicus brief cannot function under a jurisprudence where cases like *Van Orden* are decided unlike *Van Orden*. The end result will have government entities banning religiously-tinged displays to avoid lengthy and costly litigation. While this may be acceptable or even desirable to those who oppose monuments that acknowledge religion's historical significance, it is certainly not required by the Establishment Clause and this Court should take this opportunity to say so.

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[9] While the district court's order to remove the sizeable Monument did not give a deadline, the Commissioners have taken steps to comply by asking Mr. Bush to remove the Monument and by soliciting bids to have it removed if he fails to do so. They have also filed a Fed. R. Civ. P. 60(b) motion with the district court to allow delay of removal until after this Court completes its review of this case.

III. LOWER STANDING REQUIREMENTS IN ESTABLISHMENT CLAUSE CASES HAVE CONTRIBUTED TO THE CURRENT CONFUSION.

While Green calls offended-observer standing a "time-honored principle," Resp. Brf. at 32, he is unable to cite a single case where this Court has directly ruled on the issue because none exist. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions." *Domino's Pizza Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006) (citations omitted).

This case provides an excellent opportunity to directly address offended observer standing because it exemplifies the confusion in the case law that has resulted from relaxed lower court standing requirements in this area. Offended observer standing is too easily met since all that is required is mere exposure to a display that is deemed offensive. *See O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005).

This problem can be solved now by simply requiring Establishment Clause standing to be treated like all other standing.

CONCLUSION

This Court should review the Tenth Circuit's decision because it is in conflict with both this Court's cases and those of other Circuits. It should also review

this case to determine whether courts should continue to be inundated with Establishment Clause cases based solely on observation of putatively offensive displays.

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IN THE
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HASKELL COUNTY BOARD OF COMMISSIONERS, ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN LEGION DEPARTMENT OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Matthew Morrison, *The* Van Orden *and* McCreary County *Cases: Closing the Gaps Remaining Between the Established Lines of Ten Commandments Jurisprudence*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 435 (Spring 2007) 7

INTEREST OF *AMICUS CURIAE*[1]

The American Legion Department of California (the "Department of California") represents approximately 130,000 Legionnaires organized in posts, districts, and areas throughout California. In 1919, Congress chartered the American Legion as a patriotic, mutual-help war-time veterans organization. Since its inception, the American Legion has maintained an ongoing concern for and commitment to veterans and their families, and it has been a tireless advocate for veterans' rights. It is dedicated to preserving American values, promoting patriotism, and encouraging selfless service and sacrifice among citizens. It honors men and women of our armed forces who have already sacrificed for our country, supports those who continue to sacrifice for our country today, and prepares those who will be called to sacrifice for all of us in the future.

Veterans' memorials and monuments are proud expressions of gratitude and remembrance intended to honor these brave men and women. Some of these memorials and monuments have stood for decades, while others are relatively new or yet to be built. Some of these memorials and monuments are now, or have been, the subject of challenges under the Establishment Clause of the United States Constitution.

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[1] All counsel of record have received notice pursuant to Supreme Court Rule 37.2(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no portion of this brief was authored by counsel for a party, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

The Department of California has established the Defense of Veterans Memorials Project to defend California's veterans memorials and monuments that are now or may become subjects of litigation. Although this petition arises from a Ten Commandments monument in Haskell County, Oklahoma, the Department of California has a significant interest in this case because the analysis and outcome here could affect veterans' memorials and monuments nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is nothing in the Establishment Clause, or in this Court's Establishment Clause jurisprudence, that supports the notion that a memorial or monument that includes religious symbolism is more likely to be unconstitutional if someone rushes to the courthouse to file a challenge within a few days, months, or years after the monument is first displayed. Such a hurried challenge may indicate that the plaintiff finds the monument objectionable, but it does not show that a reasonable observer would view the monument as divisive or having a religious purpose.

Despite this, the Tenth Circuit concluded that the Ten Commandments monument in Haskell County, Oklahoma, violates the Establishment Clause because James Green filed his lawsuit "less than one year after the Monument was unveiled." *Green v. Haskell County Bd. of Comm'rs*, 568 F.3d 784, 807 (10th Cir. 2009); *see also id.* at 791-92 (noting that the monument was unveiled in November 2004 and that Mr. Green filed his challenge in October 2005). The court of appeals brushed aside the similarities between the Haskell County monument and the one

upheld by this Court in *Van Orden v. Perry*, 545 U.S. 677 (2005). The Tenth Circuit instead focused on "the sharp contrast between the timing of the legal challenges to the monument in *Van Orden* and the one in this case," *Green*, 568 F.3d at 806, and concluded that Mr. Green's hurried challenge to the Haskell County monument "shed[s] significant light on whether the reasonable observer would have perceived [it] as having the effect of endorsing religion," *id.*

The Tenth Circuit's dash-to-the-courthouse rule purports to come from Justice Breyer's concurring opinion in *Van Orden*, where he found the fact that a monument had stood on the grounds of the Texas State Capitol without legal challenge for forty years was dispositive of the constitutional challenge. *Van Orden*, 545 U.S. at 702-04 (Breyer, J., concurring in the judgment). But the *inverse* of that proposition—that a monument that *is* challenged quickly is more likely to be unconstitutional—does not flow from Justice Breyer's opinion. Nor does it make any sense.

First, a rush to the courthouse is not a factor with any pedigree from either the Establishment Clause itself or this Court's Establishment Clause jurisprudence, which focuses on determining whether a monument has a secular or religious purpose. Nothing in the Establishment Clause or this Court's cases supports the Tenth Circuit's notion that a hurried challenge to a monument (or, for that matter, a statute or governmental practice) reflects an unconstitutional religious purpose or promotes divisiveness. If allowed to stand, the dash-to-the-courthouse rule will inundate federal courts with

Establishment Clause cases. Plaintiffs will file prematurely, well before the facts essential to the reasonable observer test are developed.

Second, the Tenth Circuit's reasoning improperly encourages a form of heckler's veto. It allows the most sensitive members of society to dictate what sorts of monuments may be displayed on government property, even though this Court has repeatedly endorsed a *reasonable* observer test in the context of the Establishment Clause. In fact, this Court has refused to permit a heckler's veto in Establishment Clause cases and other aspects of its First Amendment jurisprudence. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). But under the Tenth Circuit's rationale, hecklers can successfully challenge monuments (or statutes or practices) that have any arguable religious implications simply by rushing to the courthouse.

Third, the Tenth Circuit's decision, if allowed to stand, will result in inconsistent outcomes for similar monuments of different longevities. Courts will be more likely to uphold older monuments that incorporate religious symbolism and more apt to strike down newer ones that are challenged soon after they are displayed. For example, newly installed grave markers, or stand-alone monuments, adorned with the Christian cross or the Star of David at a national cemetery may be declared unconstitutional as long as someone is willing to bring the lawsuit quickly, but older grave markers of those who died generations ago will be upheld simply because they have not been the subject of litigation. Likewise, the frieze in this Court's courtroom, complete with the image of Moses holding the Ten

Commandments, presumably does not violate the Establishment Clause. Yet a state replica of the same frieze in a new or refurbished courtroom could be declared unconstitutional.

This case warrants this Court's review not only because (as shown in the petition) there is a conflict among the courts of appeals, but also because this case raises important constitutional issues that affect all state and local governmental units.

ARGUMENT

I. WHETHER THE PLAINTIFF HAS DASHED TO THE COURTHOUSE IS IRRELEVANT TO CONSTITUTIONALITY UNDER THE ESTABLISHMENT CLAUSE

The fact that a monument has stood without legal controversy for a long time may indicate a number of things: that a reasonable observer would conclude that the monument has a secular purpose; that the monument does not have a divisive effect; or that there is a historic lack of complaints. *See Van Orden*, 545 U.S. at 701-03 (Breyer, J., concurring in the judgment) (instructing that the passage of a long period of time before a lawsuit can weigh in favor of constitutionality); *see also Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008) (noting that complaints against the challenged Ten Commandments monument "did not surface until the monument had been in place for over thirty years"); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1035 n.20 (10th Cir. 2008) (holding that crosses on a long-standing city seal did not violate the Establishment Clause: "We note here that the use of three crosses in the City seal has gone legally

unchallenged for at least forty years.") (citing *Van Orden*).

But none of this Court's Establishment Clause tests, whether under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), or Justice Breyer's concurrence in *Van Orden*, suggests that a monument is, or is more likely to be, unconstitutional simply because someone launches a challenge soon after its dedication. Even assuming that a monument's longevity without challenge weighs in favor of constitutionality, the inverse proposition embraced by the Tenth Circuit—that a new, quickly challenged monument is more likely to be unconstitutional—does not logically follow. *Cf. Cone v. Bell*, 129 S. Ct. 1769, 1784 (2009) (holding that "[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however," as evidence material to sentencing is not necessarily material to guilt).

A plaintiff's hurried challenge stops far short of proving a reasonable observer's judgment or the amount of divisiveness within the community overall. It merely represents the subjective opinion of the individual filing the suit. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) ("[O]ne of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985) (O'Connor, J., concurring in the judgment)); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in

part and concurring in the judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from . . . discomfort . . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].").

Indeed, although this Court noted as background in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), that the lawsuit was filed just months after the challenged monuments were unveiled to the public, it did not consider the lawsuit's timing as a factor in the constitutional analysis—much less a controlling factor. *See id.* at 851-52 (the counties unveiled their monuments in the summer of 1999, and the plaintiffs filed their lawsuit in November 1999).

Furthermore, the Tenth Circuit's dash-to-the-courthouse test raises many more unresolved questions than it answers. For example, courts must now decide how long a monument must stand before it can pass constitutional scrutiny—a difficult task because the First Amendment is silent on this issue. The Tenth Circuit's opinion in this case suggests that one year is not enough. But what about two years? Five? Ten? The constitutionality of a monument depends on whether it has a religious or secular purpose, not on the arbitrary timing of the first lawsuit and random legal line-drawing. *See* Matthew Morrison, *The* Van Orden *and* McCreary County *Cases: Closing the Gaps Remaining Between the Established Lines of Ten Commandments*

Jurisprudence, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 435, 448-49 (Spring 2007) ("It is questionable whether courts should be in the business of assessing what length of time constitutes an adequate history to withstand challenge under the Establishment Clause.") (footnote omitted).

If it stands, the Tenth Circuit's opinion will embolden future plaintiffs to file Establishment Clause challenges immediately in order to benefit from this dash-to-the-courthouse rule. The result will be federal court dockets across the country loaded with Establishment Clause challenges to new monuments, statutes, and governmental practices; cases filed prematurely and without the full factual development necessary to execute the reasonable observer test; and inconsistent results among similar monuments based solely on the monuments' varying longevities.

II. A DASH-TO-THE-COURTHOUSE RULE WILL RESULT IN AN IMPERMISSIBLE HECKLER'S VETO

This Court strongly disfavors the "heckler's veto": government suppression of speech to avoid the reaction of a heckling listener. *See Capitol Square Review & Advisory Bd.*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment). By focusing on the promptness of litigation, however, the Tenth Circuit's decision in this case encourages hecklers to exercise a veto in Establishment Clause cases by essentially requiring courts to strike down monuments that are challenged soon after they are unveiled to the public. The Tenth Circuit's opinion in *Green* encourages hecklers to file suit immediately after the unveiling

of a government monument with any arguable religious connotations. *See Green v. Haskell County Bd. of Comm'rs*, 574 F.3d 1235, 1239 (10th Cir. 2009) (Kelly, J., dissenting from the denial of rehearing en banc) (explaining that the opinion allows a heckler's veto).

Furthermore, "[b]y treating the presence of litigation as having controlling weight, the court comes perilously close to creating a new bright-line rule: all new Ten Commandments displays are unconstitutional as long as someone is willing to exercise a heckler's veto by filing suit." *Id.* As a practical matter, someone will almost always be willing to file suit. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring in the judgment) ("Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.") (O'Connor, J., concurring in part and concurring in the judgment).

This Court has generally refused to allow the heckler's veto in First Amendment cases and, in particular, has held that a heckler should not be allowed a veto in the Establishment Clause context. In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Court "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the

youngest members of the audience might misperceive." *Id.* at 119; *cf. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (rejecting a heckler's veto in the free speech context).

Similarly, a Ten Commandments monument should not be struck down on the basis of what the most sensitive and litigious members of the public might perceive. An Establishment Clause analysis that turns on what such members perceive cannot coexist with this Court's longstanding "reasonable observer" test and cannot be reconciled with the "divisiveness" approach taken by Justice Breyer in *Van Orden*. The rule announced by the Tenth Circuit will do just what this Court's decision in *Good News Club* and the reasonable observer test seek to avoid: it will give sensitive plaintiffs veto power.

III. A DASH-TO-THE-COURTHOUSE RULE WILL PRODUCE INCONSISTENT RESULTS

Treating a short passage of time before a monument is challenged as a critical factor under the Establishment Clause will result in inconsistencies in constitutional outcomes for older and newer monuments. As one author has noted:

> Although the Texas monument was not the subject of litigation before *Van Orden*, at least one identical monument placed by the Eagles in Salt Lake City, Utah was the target of lawsuits in the 1970s. If divisiveness truly is dispositive, then the Utah monument could be unconstitutional even though

> its substance and genesis are indistinguishable from the Texas monument in *Van Orden*.

Edith Brown Clement, *Public Displays of Affection . . . For God: Religious Monuments After* McCreary & Van Orden, 32 Harv. J.L. & PUB. POL'Y 231, 245 (Winter 2009) (citing *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 30 (10th Cir. 1973)) (footnote omitted).

For example, existing gravestones and stand-alone monuments at Arlington National Cemetery and other national cemeteries bearing the Christian cross or the Star of David might survive a constitutional challenge because of their longevity. *Cf. Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring in the judgment) (discussing the constitutionality of "[s]ectarian identification on markers in Arlington Cemetery" under the Establishment Clause analysis). Yet new gravestones and stand-alone monuments with the same symbols may not withstand Establishment Clause scrutiny if challenged within days or months of being constructed.

The sarcophagus at the Tomb of the Unknowns at Arlington bears the inscription:

HERE RESTS IN
HONORED GLORY
AN AMERICAN
SOLDIER
KNOWN BUT TO GOD

That inscription has existed without an Establishment Clause challenge since its

construction in 1932. Under the Tenth Circuit's logic, it is far from clear whether the same inscription on a new sarcophagus dedicated to unknown soldiers lost in the Iraq or Afghan wars would survive challenge.

The time factor also proves unworkable when one jurisdiction seeks to replicate another's display. For example, a state supreme court might decide to construct for its courtroom a replica of the courtroom frieze that was mentioned in both *Van Orden* and *McCreary County*. *Van Orden*, 545 U.S. at 688; *McCreary County*, 545 U.S. at 874. Or a state or local government might accept a donated replica of the Texas State Capitol's Ten Commandments monument for display on government property. In either case, if someone promptly files suit, the reviewing court might well find the display unconstitutional.

These hypothetical examples illustrate how the time factor may produce inconsistent and arbitrary results. By standing for decades without a challenge, old displays have a higher likelihood of passing Establishment Clause muster. *See Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). But newer, identical displays risk being declared unconstitutional by a court persuaded that a quick-on-the-draw plaintiff represents the reasonable observer. *See Green*, 568 F.3d at 807. The fact that two identical monuments standing side-by-side on a courthouse lawn might, because of their ages, face different constitutional fates suggests that the constitutional principle identified by the Tenth Circuit is not well grounded.

CONCLUSION

This case demonstrates the inevitable problems with relying on a short passage of time to invalidate a monument under the Establishment Clause. Under the Tenth Circuit's logic, the monument in Haskell County must come down because a heckler challenged its existence within the first year. This result cannot be reconciled with *Van Orden*, which declared a similarly designed monument constitutional, or with any other Establishment Clause case decided by this Court. Nor can this result find support in the Constitution. Moreover, the issue is important and affects state and local governments and concerned citizens around the country.

This Court should grant the petition for certiorari and reverse the decision of the Tenth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HASKELL COUNTY BOARD OF COMMISSIONERS, *et al.*,
Petitioners,

v.

JAMES W. GREEN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF INDIANA, IDAHO, MICHIGAN, NEW MEXICO, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Did the Tenth Circuit err by holding in conflict with *Van Orden* and recent decisions in the Ninth and Eighth Circuits, that it violated the Establishment Clause to include a monument passively acknowledging the historical significance of the Ten Commandments among other privately donated historical monuments?

2. Did the Tenth Circuit err by invoking an *uninformed and mistaken* "reasonable observer" in applying the endorsement test, in conflict with the *well-informed* "reasonable observer" employed by the Second, Sixth, Seventh, and Eighth Circuits in Establishment Clause cases?

3. Did the plaintiff, as an un-coerced "offended observer," lack Article III standing?

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Idaho, Michigan, New Mexico, South Carolina, Texas, Virginia, Washington and West Virginia, respectfully submit this brief as *amici curiae* in support of the Petitioners. As the Court is well aware, religious displays on public land dot the landscape all across the country. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 689-91 (2005); *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 906 (2005) (Scalia, J., dissenting). As the Court is also aware, offended citizens bring lawsuits challenging these displays with some frequency, so States are often called upon to defend Ten Commandments and other displays bearing religious texts, symbols and imagery. *See, e.g., Van Orden*, 545 U.S. at 685-86 n.4, n.5; *McCreary County*, 545 U.S. at 850; *ACLU v. City of Plattsmouth, Neb.*, 419 F.3d 772 (8th Cir. 2005); *ACLU v. Grayson County, Ky.*, No. 4:01CV-202-JHM, 2008 WL 859279 (W.D. Ky. Mar. 28, 2008). These lawsuits are particularly burdensome because public officials cannot reliably predict their outcomes based on precedents from this or any other court. States therefore have a compelling interest in obtaining clearer guidance for public officials and lower courts regarding the circumstances under which governments may display the Ten Commandments.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *amici* states' intention to file this brief more than 10 days prior to the due date of this brief.

The district court in this case commented that "a court needs a guide to understand how [the Establishment Clause] might impact a monolithic marble monument with engravings of the Commandments and the Mayflower Compact." App. at 80a. Unfortunately, despite this Court's decisions in *Van Orden* and *McCreary County*, the lower courts (including the courts of appeals) continue to be divided on the circumstances in which such displays are permissible and over the tests they should use to evaluate such monuments. As one judge below put it, "[o]ne might think that two such recent precedents addressing the same subject would drastically simplify a trial court's quest in deciding whether the Monument at issue here withstands constitutional scrutiny. One might be wrong." App. at 80a.

This case provides the Court with an excellent opportunity to refine and clarify the approach lower courts should take in evaluating Ten Commandments and other religious displays on public property.

SUMMARY OF THE ARGUMENT

Throughout the United States, state and local governments have incorporated into their buildings, grounds and parks various displays, monuments, statues, paintings, and other artistic expressions that have both religious and secular meaning. These displays exist as a part of an overall education of the foundations of our governments and culture. Such displays are not intended to declare official religious doctrine, nor is anyone likely to mistake them for

such. There is nothing about Ten Commandments displays, new or old, that threatens a tipping point of official religious sanction or indoctrination.

The Court should use this case as an opportunity to consider explicitly whether the "endorsement test" that emerged from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989), and that the Court referenced in *McCreary County* but not *Van Orden*, remains valid for Ten Commandments display cases. In order to provide clearer guidance for lower courts that is more in keeping with the text and history of the Establishment Clause, the court might use this case to examine whether the proper test should instead be whether a particular Ten Commandments display is religiously coercive. In the alternative, if the Court wishes to retain aspects of the endorsement test, it can use this case as a vehicle for clarifying that standard as well, such as whether the "purpose" prong of the endorsement test remains functional, and if so, whether that is the only basis (other than outright religious coercion) for holding a Ten Commandments display invalid.

Finally, even if the Court has doubts about clarifying Ten Commandments display doctrine as such, it should take the case to provide additional fact-based guidance for lower courts to consider in future cases.

ARGUMENT

I. Confusion Below Demonstrates that Ten Commandments Doctrine Needs Further Refinement

While Establishment Clause doctrine as a whole is difficult to decipher, it may be most confusing when applied to Ten Commandments displays. In *Van Orden v. Perry*, 545 U.S. 677, 691-92 (2005), the Court permitted the Texas State Capitol to display a Ten Commandments monument because it found a valid secular purpose to display a series of monuments representing the state's political and legal history. On the very same day, in *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 850-51, 881 (2005), the Court held that a display of the Ten Commandments as part of a series of monuments in a Kentucky courthouse did not have a valid secular purpose. Thus, Texas was permitted to display the Ten Commandments amongst other displays while Kentucky was not.

Applying these opinions to subsequent cases has proved to be a considerable challenge for the lower courts. Results in the wake of *McCreary County* and *Van Orden* have been anything but consistent.

1. As with *McCreary County* and *Van Orden* themselves, the secular context in which a monument with religious overtones is displayed has sometimes been found to mitigate the appearance of government religious endorsement and, at other times, to be nothing but an attempt by the government to sneak around the Establishment

Clause. In *ACLU of Ohio Foundation, Inc. v. Board of Commissioners of Lucas County, Ohio*, 444 F. Supp. 2d 805, 815 (N.D. Ohio, 2006), the court found that "[t]hough the collection appears to lack a cohesive or unitary purpose, placement of this monument among others of a secular and commemorative character weighs in favor of constitutional acceptability." *See also O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1228 (10th Cir. 2005) (upholding a statue allegedly hostile to Roman Catholicism because nearby secular displays would give a reasonable observer the sense of being in a museum rather than amidst government denigration of a particular religious faith).

In *ACLU v. Grayson County, Ky.*, No. 4:01CV-202-JHM, 2008 WL 859279, at *9 (W.D. Ky. Mar. 28 2008), however, the court discussed *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *McCreary County* (but did not mention *Van Orden*) and rejected a courthouse "Foundations of American Law and Government" display that included the Ten Commandments with other documents because "[a]n objective observer would understand that the Foundations Display's sponsor desired to post the Ten Commandments in the Courthouse for purely religious reasons."

Other cases rely more on *Van Orden* than *McCreary County*, finding that "a limited exception to the *Lemon* test exists in contexts closely analogous to that found in *Van Orden*." *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008); *see also Twombly v. City of Fargo*, 388 F.Supp.2d 983, 986-90 (D.N.D. 2005) (applying only *Van Orden*);

Russelburg v. Gibson County, Ind., No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, *2 (S.D. Ind. 2005) ("the similarities between this case and *Van Orden* are too vivid to dismiss."). Not even these courts are certain about their doctrinal footing, however: "We cannot say how narrow or broad the 'exception' may ultimately be; not all Ten Commandments displays will fit within the exception articulated by Justice Breyer." *Card*, 520 F.3d at 1018.

Meanwhile, in an en banc decision, the Eighth Circuit found a Ten Commandments monument standing *alone* to be constitutional because "[w]hile there are limits to government displays of religious messages or symbols . . . we cannot conclude that Plattsmouth's display of a Ten Commandments monument is different in any constitutionally significant way from Texas's display of a similar monument in *Van Orden*." *ACLU v. City of Plattsmouth, Neb.*, 419 F.3d 772, 778 & n.8 (8th Cir. 2005) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test."). The dissenters, however, argued that "*Van Orden* did not extend constitutional protection to Ten Commandments displays with no secular or historical message." *Id.* at 781 (Bye, J., dissenting).

To put it mildly, there is logical tension in the notion that the Establishment Clause permits one locale, Plattsmouth, to display a Ten Commandments monument without any kind of secular context, but prohibits another, Grayson County, from doing so even in context with other

historical documents, and seems to permit others to maintain any type of monument with religious overtones—even one hostile to religion as in *Washburn*—as long as it is set amongst other randomly placed and selected statues. Yet the current state of Establishment Clause doctrine, which seems to be little more than an ad hoc test dependant upon infinite facts and circumstances, makes such results inevitable.

2. This matter showcases yet another religious display on public property causing division and uncertainty in the lower courts. The facts align with those of *Van Orden*, *see* Petition at 13-14, where the plurality explicitly found that *Lemon* and the endorsement test it spawned is "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." *Van Orden*, 545 U.S. at 686. The plurality instead applied an "analysis [that] is driven both by the nature of the monument and by our Nation's history," in finding that "[t]he inclusion of the Ten Commandments monument in this group [of monuments representing the State's political and legal history,] has a dual significance, partaking of both religion and government." *Id.* at 686, 691-92.

Justice Breyer's concurring opinion in *Van Orden* also cast doubt on the applicability of the *Lemon* test to display cases, noting that "no exact formula can dictate a resolution to such fact-intensive cases" and that in borderline cases, there is "no test-related substitute for the exercise of legal judgment." *Id.* at 700 (Breyer, J., concurring in the judgment).

Here, the district court undertook what it called "a nuanced fact-specific inquiry" and found that under all three potentially relevant cases—*Van Orden*, *McCreary County* and *Lemon*—the Haskell County monument was constitutional. App. at 87a, 89a, 92a, 97a. Acknowledging the similarities of this case with *Van Orden*, the court found that the monument placed by a private citizen on the grounds of the Haskell County Courthouse (along with several other privately donated monuments) did not offend the Establishment Clause. App. at 108a. In explaining the few minor differences between the two cases—namely the longevity of the Ten Commandments monuments and the thematic consistency with surrounding displays—the court found that it would be "unworkable" and "illogical" for Justice Breyer's *Van Orden* concurrence to stand for the proposition that "newer religious displays are automatically suspect" or that if there is "no grand integral design of the various monuments and displays on the lawn[,]" that a Ten Commandments monument must be unconstitutional. App. at 91a, 93a.

A Tenth Circuit panel, however, reversed, deciding that, because the Supreme Court has not explicitly overturned *Lemon*, lower courts "cannot . . . be guided in [their] analysis by the *Van Orden* plurality's disregard of the *Lemon* test." App. at 23a-24a n.8. In its *Lemon* endorsement analysis, the court found the monument to have "the impermissible principal or primary effect of endorsing religion in violation of the Establishment Clause." App. at 48a. To arrive at that conclusion, the Tenth Circuit relied on such seemingly

irrelevant facts as the size of the town where the monument sits, the artistic value of the collection of monuments on the courthouse lawn, and the speed in which someone filed a lawsuit challenging the monument. App. at 35a, 42a n.16, 44a.

An evenly divided Tenth Circuit rejected en banc rehearing, but two judges wrote vigorous dissents regarding the constitutionality of the monument. App. at 113a, 131a. Judge Kelly's dissent explains that the court's opinion improperly disregards *Van Orden* and misinterprets *Lemon*'s endorsement test because it "(1) improperly creat[es] a per se rule that new Ten Commandments displays are unconstitutional as long as someone files suit quickly; (2) . . . mak[es] the effect of the Establishment Clause depend on the size of the community; and (3) conduct[s] a subjective analysis rather than an objective analysis." App. at 116a. Judge Gorsuch argued in dissent that "the panel opinion mistakes the Supreme Court's clear message that displays of the decalogue alongside other markers of our nation's legal and cultural history do not threaten an establishment of religion." App. at 131a. Both dissents also noted that the Tenth Circuit's analysis conflicts with the decisions of all other circuits that have considered Ten Commandments cases since *Van Orden*. App. at 129a-30a (Kelly, J., dissenting) ("this case is an outlier"); App. at 131a (Gorsuch, J., dissenting) (the opinion "mak[es] us apparently the first court of appeals since *Van Orden* to strike down an inclusive display of the Ten Commandments").

This case thus shows very clearly that the Court's Establishment Clause doctrine needs to be further refined because lower courts are unable to apply it consistently. Indeed, if lower courts do not believe they can rely on *Van Orden* for guidance, even in a case with such similar facts, it is difficult to imagine that *Van Orden* retains much precedential value at all. The Court therefore needs to weigh in yet again on the permissibility of Ten Commandments displays.

II. This Case Presents an Opportunity to Clarify the Doctrine in Useful Ways

Prior to *McCreary County* and *Van Orden*, the two-part endorsement test, which has its roots in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but found full articulation in *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) and *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989), was the main focus in Ten Commandments and other religious display cases in lower courts. *McCreary County* and *Van Orden*, however, have cast considerable doubt on the proposition that a full-blown endorsement analysis, where a court examines a display for both impermissible purposes and impermissible effects, is required in every Ten Commandments display case.

More specifically, the only rule that possibly explains the divergent holdings in *McCreary County* and *Van Orden* is the inquiry into whether the government has sponsored a Ten Commandments display with the improper purpose of endorsing religion. *McCreary County*, 545 U.S. at 862, 869

("When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable."); *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring) ("The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate.").

One might infer from this dichotomy that there is no longer any need to inquire into whether a particular non-coercive Ten Commandments display has the "effect" of endorsing religion. *See McCreary County*, 545 U.S. at 901 (Scalia, J., dissenting) (inferring from the Court's decision that the "government action [had] a wholly secular effect"); *Van Orden*, 545 U.S. at 686 (disregarding the endorsement test completely); *see also, e.g.*, *Lucas County*, 444 F.Supp.2d at 811-12 ("In light of the Court's application of the purpose prong in *McCreary*, displays of the Decalogue, even in a courthouse, if undertaken without a religious purpose, may be constitutionally acceptable."); *ACLU v. Mercer County, Ky.*, 432 F.3d 624, 626 (6th Cir. 2005) (finding that a collection of documents in a courthouse that were very similar those in *McCreary County* would only "be problematic [if there is] something more to signal a predominantly religious purpose.").

Not all courts have arrived at that conclusion, however. *See* App. at 48a; *see also Mercer County*, 432 F.3d at 636, 640 (applying both the purpose and effects tests); *ACLU of Ky., v. Rowan County, Ky.*,

513 F. Supp. 2d 889, 905 (E.D. Ky. 2007) (same); *Lucas County*, 444 F. Supp. 2d at 811-13 (same).

For the sake of providing clarity to courts and officials, the Court needs at the very least to say whether lower courts should still apply a full-blown two-part endorsement test, or whether, given the Court's apparent comfort with the Ten Commandments generally in *McCreary County* and *Van Orden*, inquiry into governmental purpose is sufficient. In this regard, it is worth observing that alleviating public officials and lower courts of the burden of determining whether a particular non-coercive Ten Commandments display has the "effect" of endorsing religion would eliminate some of the random fact gathering that occurs in Ten Commandments display cases, such as this one. *See* App. at 35a, 42a n.16, 44a.

That said, the purpose test itself also has substantial problems, as Indiana and other states have long argued. *See, e.g.*, Brief for State of Indiana et al. as Amici Curiae Supporting Petitioners at 17-36, *Salazar v. Buono*, No. 08-472 (U.S. June 8, 2009); Brief of State of Indiana et al. as Amici Curiae Supporting Respondents at 8-19, *Van Orden v. Perry*, 545 U.S. 677 (2005) (No. 03-1500); Brief of State of Alabama et al. as Amici Curiae Supporting Petitioners at 10-11, *McCreary County, Ky. v. ACLU*, 545 U.S. 844 (2005) (No. 03-1693). One central problem is that, under the purpose test, substantially identical displays are often treated differently simply because an official statement or the participation of clergy at a dedication ceremony years or decades earlier are adjudged in hindsight to

have conveyed a purpose of advancing religion. *Compare Van Orden*, 545 U.S. 677 *with Books v. City of Elkhart*, 235 F.3d 292, 303-04 (7th Cir. 2000) (determining that Elkhart had accepted an Eagles monument in 1958 with an improper religious purpose because clergy had spoken at the dedication ceremony); and *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 711 (7th Cir. 2001) (disregarding the Indiana governor's stated secular purpose for a Ten Commandments monument and finding that the state had presented no valid secular justification).

Accordingly, the Court could also use this case as a vehicle for considering whether the purpose inquiry—indeed the endorsement test as a whole—is justified by the history and text of the Establishment Clause. The Court could evaluate whether, for example, a better approach would be to ask if a particular Ten Commandments display is religiously coercive. *See, e.g.*, App. at 115a n.3; *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part).

These are but a few potential avenues the Court might take to clarify Ten Commandments display doctrine. Limiting the judicial inquiry into whether a Ten Commandments display is either coercive or supported by an improper purpose would simplify matters, and in the process would likely yield far more predictable results than courts currently are able to achieve.

III. If Display Cases are Too Fact-Sensitive for a Better Test, the Court Should Still Decide More Cases, Including this One, to Provide More Guidance

There are hundreds, if not thousands, of Ten Commandments and other religious displays on public property across the United States. *See, e.g.*, *Card*, 520 F.3d at 1013. Public officials remain interested in adding more, *see, e.g.*, Samantha Sommer, *County working to fix Ten Commandments monument*, Springfield News-Sun, Nov. 13, 2009; Karen Voyles, *Dixie courthouse unveils the Ten Commandments*, The Gainesville Sun, Nov. 28, 2006.

Public-property Ten Commandments displays, new and old alike, precipitate lawsuits. Yet, as the district court noted, lawsuits challenging Ten Commandments displays are "not so much evidence of government establishing religion as . . . evidence of jurisprudence provoking litigiousness." App. at 91a. If the outcome of Establishment Clause cases were more predictable, there would be fewer lawsuits challenging the monuments—either because officials would conform the displays to the law or because offended citizens would know they cannot win in court. But as long as there is uncertainty, these cases are not going away.

Justice Breyer stated in *Van Orden* that, in Ten Commandments cases one should "rely less upon a literal application of any particular test than upon consideration of the basic purposes of the [Establishment Clause itself]." *Van Orden*, 545 U.S.

at 703-04 (Breyer, J., concurring); *see also Lynch*, 465 U.S. at 678 ("the inquiry calls for line drawing; no fixed, *per se* rule can be framed."). If indeed there can be no clearer test for Ten Commandments display cases, the Court simply needs to decide more such cases so that public officials and lower courts will have a more robust body of law to use as guidance. *Cf.* Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 Am. Crim. L. Rev. 1123, 1129 & n.32 (1996) (discussing the incremental development of the exclusionary rule through multiple factually discrete cases). This case, therefore, is cert-worthy if for no other reason than that it provides an opportunity to add to the Court's body of Ten Commandments display law.

CONCLUSION

The Court should grant the Petition and reverse the decision below.

Respectfully submitted,

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